FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS AND ORDERS

JANUARY 1, 1983 TO JUNE 30, 1983

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF JUNE 30, 1983

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Took oath of office September 30, 1981

DAVID A. CLANTON, *Commissioner*
Took oath of office August 26, 1976

MICHAEL PERTSCHUK, *Commissioner*
Took oath of office April 21, 1977

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

GEORGE W. DOUGLAS, *Commissioner*
Took oath of office December 27, 1982

CAROL M. THOMAS, *Secretary*[1]
Appointed June 20, 1977

BENJAMIN I. BERMAN, *Acting Secretary*[2]

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

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[1] Resigned effective February 19, 1983.

[2] From February 19, 1983 to April 17, 1983.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

OGILVY & MATHER INTERNATIONAL INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9149. Complaint, Feb. 5, 1981—Decision, Jan. 4, 1983

This consent order requires a New York City advertising agency to cease, among other things, employing the name Aspercreme or any other tradename which erroneously implies that aspirin is an active ingredient of the product. The order also bars misrepresentations concerning the validity, conclusions, interpretations or results of any test or study; as well as unsubstantiated claims regarding the mode of action by which a drug treats, eases or cures a symptom, condition or disease. Respondent is further prohibited from representing without reasonable substantiation that any topically applied drug is faster or more effective than aspirin in the treatment of arthritis, tendonitis, bursitis or rheumatism, or that it involves a new scientific or mechanical principle. Additionally, the order requires the company to retain all data that substantiates or contradicts advertised product claims for a period of three years following dissemination of any advertisement subject to the order.

Appearances

For the Commission: *Randell C. Ogg, Teresa A. Hennessy, Mark L. Winerman,* and *Roberta L. Gross.*

For the respondent: *Leonard Orkin, Davis & Gilbert,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Thompson Medical Company, a corporation, (hereinafter "Thompson"), and Ogilvy & Mather, Inc., a corporation, (hereinafter "Ogilvy"), hereinafter sometimes referred to as respondents, have violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Thompson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 919 Third Ave., New York, New York.

PAR. 2. Ogilvy is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 2 East 48th St., New York, New York.

PAR. 3. Thompson is now and has been engaged in the business of manufacturing, advertising, offering for sale, sale, and distribution of various over-the-counter health care products, including the products Aspercreme Creme Rub and Aspercreme Lotion Rub (hereinafter "Aspercreme"), products advertised to treat various disorders. In connection with the manufacture and marketing of Aspercreme, Thompson is now and has been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of Aspercreme for human use. As advertised, Aspercreme is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Thompson causes said products when sold to be transported from its places of business in various states to purchasers located in various other states. Thompson maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Ogilvy is now, and for some time past has been, an advertising agency of Thompson. Ogilvy has prepared and placed for publication, advertising material to promote the sale of Aspercreme for human use.

PAR. 6. In the course and conduct of its business, and at all times mentioned herein, Thompson has been and now is in substantial competition in or affecting commerce with corporations, firms, and individuals representing or engaged in the manufacture or marketing of health care products.

PAR. 7. Ogilvy at all times mentioned herein has been and now is, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses, respondents have disseminated and caused the dissemination of certain advertisements concerning Aspercreme through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including the insertion of advertisements in magazines with national circulations and the placement

of advertisements with television stations with sufficient power to broadcast across state lines and into the District of Columbia.

PAR. 9. Typical statements and representations in said advertisements, disseminated as previously described, but not necessarily all-inclusive, are the advertisements attached hereto as Exhibits A through H.

PAR. 10. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein, respondents represented and now represent, directly or by implication that:

a. Aspercreme contains aspirin.

b. Aspercreme is a recently discovered or developed drug product.

c. Valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatic conditions, and their symptoms.

PAR. 11. In truth and in fact:

a. Aspercreme does not contain aspirin.

b. Aspercreme is not a recently discovered or developed drug product; it has been available for purchase since at least 1971 and its active ingredient has been in existence since at least 1954.

c. No valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatism, and their symptoms.

Therefore, the representations set forth in Paragraph Ten were and are false, misleading, or deceptive; and the advertisements referred to in Paragraphs Eight and Nine were and are misleading in material respects, and constituted and now constitute false advertisements.

PAR. 12. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein, respondents represented, and now represent, directly or by implication that:

a. Aspercreme is an effective drug for the relief of minor arthritis and its symptoms.

b. Aspercreme is as effective a drug as orally-ingested aspirin for the relief of minor arthritis and its symptoms.

c. Aspercreme is a more effective drug than orally-ingested aspirin for the relief of minor arthritis and its symptoms.

d. Aspercreme is an effective drug for the relief of rheumatic conditions and their symptoms.

e. Aspercreme acts by directly penetrating through the skin to the site of the arthritic disorder.

f. The use of Aspercreme will result in no side effects.

PAR. 13. At the time of the first and subsequent disseminations of the representations contained in Paragraph Twelve respondents did not possess and rely upon a reasonable basis for making those representations. Therefore, the dissemination of the said representations as alleged constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce.

PAR. 14. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein respondents have represented and now represent directly or by implication that they possessed and relied upon a reasonable basis for the representations set forth in Paragraph Twelve at the time such representations were made.

PAR. 15. In truth and in fact, respondents did not possess and rely upon a reasonable basis for the representations set forth in Paragraph Twelve at the time such representations were made. Therefore, the representations set forth in Paragraph Fourteen were and are false, misleading or deceptive.

PAR. 16. Through the use of the trade name "Aspercreme" in advertising, labels and promotional materials, respondents have represented and now represent that the product "Aspercreme" contains aspirin.

PAR. 17. In truth and in fact, "Aspercreme" contains no aspirin. Therefore, the representation in Paragraph Sixteen was and is false, misleading, deceptive or unfair, and the use of the trade name "Aspercreme" to describe a product which contains no aspirin constituted and now constitutes an unfair or deceptive act or practice in or affecting commerce.

PAR. 18. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 19. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-6100

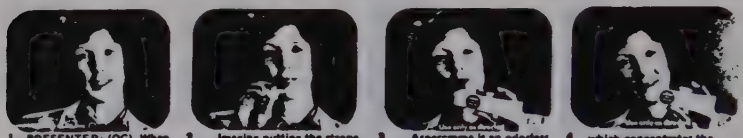
Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "RUB VERSION/NO MORTICE"
Commercial No.: QTAI 9013
Date Approved: 10/26/78

1. PRESENTER: (OC) When you suffer from arthritis,
2. Imagine being able to put ...the strong relief of aspirin
3. right where you hurt most.
4. Now, with amazing Aspercreme,
5. you can get the strong relief...of aspirin directly at the point..
6. of minor arthritis pain.
7. (OC) Strong, penetrating relief which lasts for hours
8. ...with none of aspirin's possible side effects.
9. Aspercreme. Fast-acting.
10. No embarrassing odor.
11. (VO) The strong relief of aspirin right...
12. where you hurt. Remarkable.

Exhibit A

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 5-8100

Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "VISIBLE MEN"
Commercial No.: QTAI 9033
Date Approved: 3/30/79



1. PRESENTER: (OC) When you suffer from arthritis,

2. Imagine putting the strong relief of aspirin right where you hurt.

3. Aspercreme is an odorless rub

4. which concentrates the relief of aspirin.

5. When you take regular aspirin,

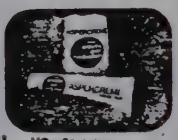
6. It goes throughout your body like this.

7. But, in seconds,

8. Aspercreme starts concentrating all the temporary relief of two aspirin

9. directly at the point of minor arthritis pain.

10. Strong, concentrated relief.



11. VO: Aspercreme.

12. The strong relief of aspirin right where you hurt.

Exhibit B

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ASPERCREME
PROGRAM NEWS 1/23/80 80-01116 30 SEC.
WNBC-TV (NEW YORK) 7:24PM

REVISION OF COMMERCIAL # 7V9635-

1. WOMAN: When you suffer from arthritis,

2. imagine being able to put the strong relief of aspirin right where you hurt most.

3. Now with amazing Aspercreme,

4. you can get the strong relief of aspirin

5. directly at the point of minor arthritis pain.

6. Strong penetrating relief which lasts for hours.

7. With none of aspirin's possible side effects.

8. Aspercreme. Fast acting, no embarrassing odor.

"contains no aspirin"
super

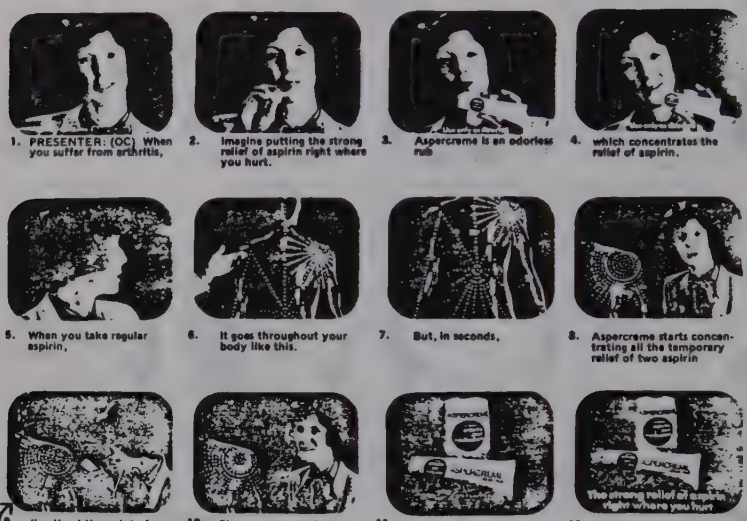
9. The strong relief of aspirin right where you hurt. Remarkable.

Exhibit C

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-8100

Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "VISIBLE MEN"
Commercial No.: QTAI 9033
Date Approved: 2/30/79



"relief without aspirin" super

Exhibit D

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ASPERCREME CREME RUB OH80-08742
PROGRAM: STATION BREAK 5/14/80 30 SEC.
WYKW-TV (L (CLEVELAND) 10:59 AM

ANNCR: Listen to what these people say about Aspercreme for temporary relief of minor arthritis pain.

2. 1ST WOMAN. I really felt like I was rubbing the pain away.

3. ANNCR: Aspercreme.

4. 1ST MAN: The Aspercreme gives me relief without upsetting my stomach.

5. Aspercreme free.

6. 2ND WOMAN: It doesn't stain my clothes.

7. 3RD WOMAN. There's no odor.

8. 4TH WOMAN: And look, it's greaseless.

9. Aspercreme.

10. 2ND MAN: I'm saying that I am really pleased with the relief I got from Aspercreme.

11. 5TH WOMAN: The relief lasts for hours.

12. ANNCR: Aspercreme. Strong, effective relief for arthritis pain. 6TH WOMAN. It really works.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Exhibit E

At last! A remarkable breakthrough for arthritis pain: Aspercreme.

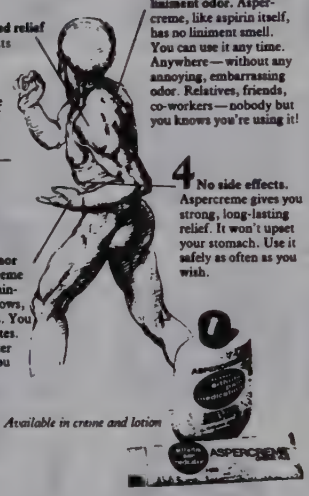
Aspercreme is an effective arthritis medicine which concentrates all the strong relief of aspirin directly at the point of pain.

1 Strong concentrated relief Aspercreme™ pinpoints relief where you hurt. Aspirin tablets go throughout your body. But Aspercreme concentrates the relief of an analgesic like aspirin directly at the point of arthritis pain—where you need it the most.

2 Fast relief for minor arthritis pain. Aspercreme penetrates deep into painful areas—fingers, elbows, knees, back, shoulders. You get deep relief in minutes. Aspercreme works faster than aspirin because you rub it in right where you hurt.

3 No embarrassing liniment odor. Aspercreme, like aspirin itself, has no liniment smell. You can use it any time. Anywhere—without any annoying, embarrassing odor. Relatives, friends, co-workers—nobody but you knows you're using it!

4 No side effects. Aspercreme gives you strong, long-lasting relief. It won't upset your stomach. Use it safely as often as you wish.



Available in creme and lotion

Exhibit F

At last! A remarkable breakthrough for arthritis pain: Aspercreme.

Aspercreme is an effective arthritis medicine which concentrates all the strong relief of aspirin directly at the point of pain.

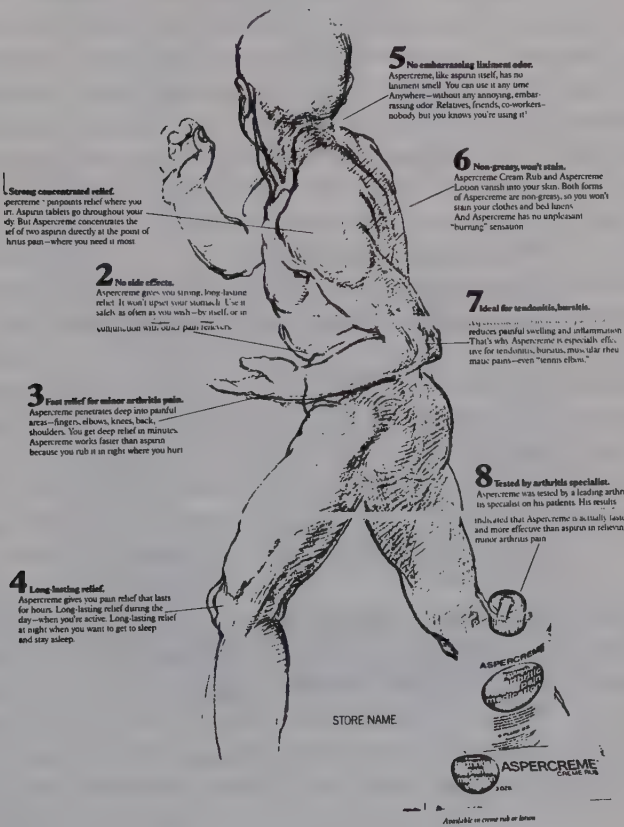
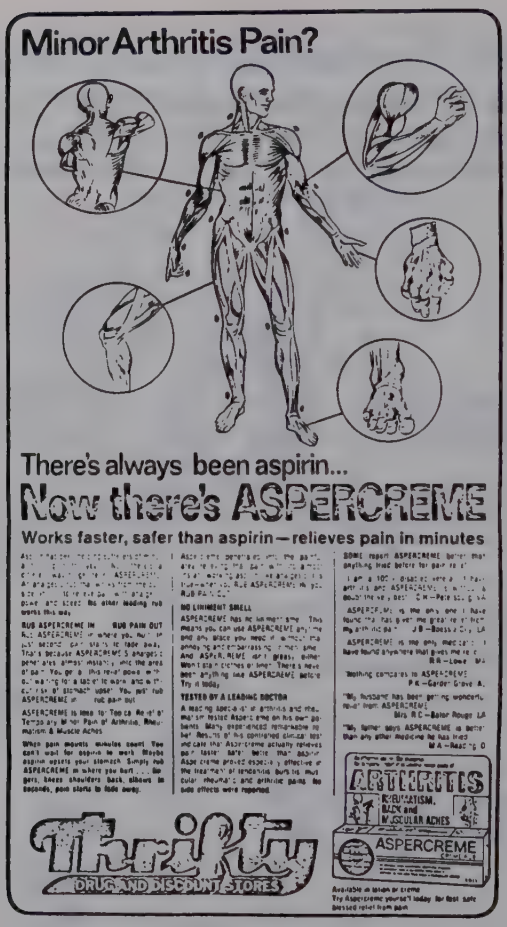


Exhibit G



AP 8/22/78 4Col. 672 Li. (THRIFTY)

Exhibit H

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Ogilvy & Mather International Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices and place of business located at 2 East 48th St., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug", as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "com-

merce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Employing the trade name "Aspercreme" for any such drug or any other tradename or terms that represents, directly or by implication, that an active ingredient of such drug is aspirin, unless such drug contains aspirin in therapeutically significant quantities.

B. Employing any trade name for any such drug which represents, directly or by implication, that such drug contains an active ingredient which it in fact does not.

C. Representing, directly or by implication, that any such drug is new, or involves a new mechanical or scientific principle, when such drug or one involving such principle has been nationally available for purchase in the United States for more than one year.

D. Representing, directly or by implication, that any such drug has an ingredient when in fact it does not have that ingredient.

E. Misrepresenting the contents, validity, results, conclusions or interpretations of any test or study.

F. Representing, directly or by implication, the mode of action by which any such drug treats, mitigates, or cures any symptom, disease, or condition unless respondent possesses and relies upon a reasonable basis substantiating the representation.

Part II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any topically applied drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Representing, directly or by implication, that any such topically applied drug is effective for the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders) or any other disease or condition;

B. Representing, directly or by implication, that any such topically applied drug is as fast or faster, or is as effective or more effective, than aspirin in the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorder) or any other disease or condition;

C. Representing, directly or by implication, that any such topically applied drug will not result in any side effect;

D. Representing, directly or by implication, that any such topically applied drug will result in fewer side effects than any other drug or device;

unless at the time of the dissemination of any such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific or medical evidence substantiating that representation. For the purposes of this Order, competent and reliable scientific or medical evidence shall include at least two well-controlled, double blinded clinical studies which meet the requirements set forth in 21 C.F.R. 314.111(a)(5)(ii) and 21 C.F.R. 330.10(a)(4)(ii), and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. *Provided, however,* with respect to any representation covered by this Part, if the Food and Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective, then in lieu of the above, respondent may possess and rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation. *Provided further, however,* where the evidence relied upon by respondent was not directly or indirectly conducted or controlled by respondent, it shall be an affirmative defense to an alleged violation of this Part for respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that a reasonable basis exists which meets the requirements of this Part. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. The written opinion shall describe the contents of the evidence upon which the opinion is based and shall set forth the qualifications of the person to render the opinion.

Part III

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, for a period of three years after respondent last disseminates the advertisements for products covered by this Order, shall retain all test results, data, and other documents or information on which it relied for its representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in its possession during either their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

Part IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate Respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

Part V

It is further ordered, That respondent shall distribute a copy of this Order to each of its operating divisions, and to each of its officers who are engaged in the preparation and placement of advertisements for products covered by this Order.

Part VI

It is further ordered, That the provisions of this Order shall not apply to Scali, McCabe, Sloves, Inc.; Cole & Weber, Inc.; and Rogers, Weiss/Cole & Weber Advertising, three subsidiary corporations wholly owned by respondent, unless a product otherwise covered by this Order is assigned or transferred from respondent to one of those corporations. However, respondent shall distribute a copy of this Order to the officers of the aforementioned corporations.

Part VII

It is further ordered, That the respondent shall, within sixty (60) days after this Order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondent, setting forth in detail the manner and form in which it has complied with this Order.

In the Matter of

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, Jan. 12, 1983

ORDER DENYING RESPONDENT'S APPLICATION FOR INTERLOCUTORY APPEAL

At the conclusion of the presentation of complaint counsel's case in this proceeding, respondent filed with the ALJ a motion to dismiss the complaint. On November 23, 1982, the ALJ issued an order declaring his decision to defer ruling on the motion until after the presentation of respondent's defense and the filing of proposed findings and conclusions of law by the parties. On December 9, respondent filed with the Commission a motion requesting an order directing the ALJ to rule *now* on respondent's motion to dismiss.

Respondent's motion is not permitted by either Commission Rule 3.22(e), which provides specifically for the treatment of motions for dismissal, or by Rule 3.23, which governs interlocutory appeals. The Commission, of course, retains the authority to grant review of an interlocutory ruling where the requirements of Rule 3.23 are not met, but it has said that it will consider doing so only on a showing of a clear abuse of discretion by the ALJ and irreparable harm to the appealing party. *E.g., American Home Products Corp.,* 90 F.T.C. 148 (1977); *General Motors Corp.,* 90 F.T.C. 172 (1977). This occasion does not present such a case.

Even when its standards for review were less stringent, the Commission repeatedly declined to review ALJ determinations denying motions to dismiss or for summary decision. *E.g., Vulcanized Rubber and Plastics Co.,* 52 F.T.C. 533 (1955); *School Services, Inc.,* 72 F.T.C. 1003 (1967); *The Hearst Corp.,* 80 F.T.C. 1011 (1972).[1] As the Commission noted in those cases, denial of such motions does not affect the ultimate outcome of a case. Moreover, a decision whether to continue a proceeding with the presentation of respondent's defense is peculiarly within the grasp of the ALJ.

The ALJ's discretion in ruling on motions to dismiss is broad. Indeed, Rule 3.22(e) expressly provides that the ALJ may defer ruling until the close of the case. Like interlocutory appeals from discovery rulings, appeals from determinations under Rule 3.22(e) merit a par-

[1] These decisions were issued under rules permitting review "upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." The current rules provide for review only upon certification by the ALJ under Rule 3.23(b) or in narrow circumstances, clearly not applicable here, delineated in Rule 3.23(a).

ticularly skeptical reception. *See, Bristol-Myers Co.,* 90 F.T.C. 273 (1977). It is inappropriate for the Commission to entertain an appeal of such a determination when the factual record is clearly in dispute and the ALJ has concluded that the proceeding should continue.

Accordingly, *it is ordered* that respondent's application for review is denied.

In the Matter of

SOUTHERN MARYLAND CREDIT BUREAU, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5(a) OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3101. Complaint, Jan. 26, 1983—Decision, Jan. 26, 1983

This consent order requires a La Plata, Md. consumer reporting agency, among other things, to cease failing to require customers, such as private investigative agencies, detectives or attorneys, who do not extend credit in the normal course of their business, to certify the purpose for which information is sought; that use of the data will be restricted to that purpose; and that the customer understands that anyone obtaining credit information under false pretenses is subject to a fine and/or imprisonment under Federal law. Respondent is further required to compile a list of detectives and attorneys from the yellow pages of the telephone book in the area where the requesting party does business, and to consult the list to determine whether certification must be provided. Additionally, the firm must require prospective customers to identify themselves and comply with certification requirements; and to withhold credit reports from parties it has reason to believe would use the information for improper purposes.

Appearances

For the Commission: *Charlyn J. Buss.*

For the respondent: *Robert T. Barbour, Barbour, Zverina & Myer,* La Plata, Md.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.,* as amended, the Fair Credit Reporting Act, Public Law 91-508, 15 U.S.C. 1681 *et seq.,* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, hereinafter referred to as the "Commission," having reason to believe that Southern Maryland Credit Bureau, Inc., a corporation, hereinafter referred to as "respondent," has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint stating its charges as follows:

Paragraph 1. For the purposes of this Complaint and the accompanying Consent Order to cease and desist, the terms *consumer, consumer report,* and *consumer reporting agency* are defined as set forth in Section 603 of the Fair Credit Reporting Act.

PAR. 2. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its sole office and place of business located at 211 North U.S. Route 301, P.O. Box 220, La Plata, Maryland.

PAR. 3. Respondent, in the ordinary course and conduct of business, is and has been regularly engaged in the practice of assembling or evaluating information bearing on consumers' creditworthiness, credit standing, and credit capacity for the purpose of furnishing, for monetary fees, consumer reports to third parties. These reports contain information including but not limited to credit histories obtained from creditors and consumer reporting agencies, public record information, and employment information and records. Creditors and others use the information contained in these reports for the purpose of establishing the consumer's eligibility for credit and other business transactions to be used primarily for personal, family, or household purposes. Respondent is thus a consumer reporting agency, as defined by the Fair Credit Reporting Act.

PAR. 4. Respondent, from its office in La Plata, Maryland, causes consumer reports to be distributed through the mail to its customers located in other States of the United States, and in the ordinary course and conduct of its business regularly sends and receives substantial numbers of communications including consumer reports across state lines through the means and facilities of interstate commerce. Respondent thus maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Accordingly, the Commission has jurisdiction over the subject matter of this proceeding and over respondent, as provided by Section 621 of the Fair Credit Reporting Act and by the Federal Trade Commission Act.

PAR. 5. All of the acts and practices alleged herein took place in the ordinary course and conduct of respondent's business and have occurred subsequent to April 25, 1971, the effective date of the Fair Credit Reporting Act.

PAR. 6. Subsequent to April 25, 1971,

1. With respect to one or more users of its reporting service as of April 25, 1971, respondent failed to require such user or users to certify the purposes for which the information about consumers was sought and that the information would be used for no other purposes; and

2. With respect to each new prospective user of its reporting service, respondent failed to make reasonable efforts to verify the identity of and the uses certified by each such new user prior to furnishing consumer reports to the user. By and through these practices respond-

ent failed to maintain procedures required by Section 607(a) of the Fair Credit Reporting Act.

PAR. 7. Subsequent to April 25, 1971,

1. Respondent contracted to provide consumer reports to one or more private investigators, who do not, in the ordinary course of business, regularly extend credit or provide insurance for personal, family or household purposes;

2. Respondent through investigation would have had reasonable grounds for believing that such user or users in such instances may not have had a permissible purpose for receiving consumer reports pursuant to Section 604 of the Fair Credit Reporting Act;

3. Respondent furnished consumer reports to such user or users without obtaining, at the time of each request for a consumer report, a written or oral certification of the specific purpose(s) for which each report was sought and that the report would be used for no other purpose; and

4. In a number of instances, respondent provided consumer reports to a private investigative agency which obtained the information as part of investigations of individuals in connection with divorce cases, child custody proceedings, personal injury litigation, or other circumstances where furnishing consumer reports is impermissible under Section 604 of the Fair Credit Reporting Act.

PAR. 8. Respondent's failures to comply with the provisions of the Fair Credit Reporting Act listed in Paragraphs Six and Seven above constitute violations of that Act and, by virtue of Section 621 of that Act, constitute violations of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Fair Credit Reporting Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Southern Maryland Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 211 North U.S. Route 301, P.O. Box 220, in the City of La Plata, State of Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Definitions: For the purpose of this order the terms *consumer, consumer report,* and *consumer reporting agency* are defined as set forth in Section 603 of the Fair Credit Reporting Act, Public Law 91–508, 15 U.S.C. 1681a (1976).

It is ordered, That Southern Maryland Credit Bureau, Inc., a corporation, its successors, assigns, officers, agents, representatives, and employees shall forthwith cease and desist from failing to maintain reasonable procedures required by Section 607(a) of the Fair Credit Reporting Act designed to limit the furnishing of consumer reports to the purposes specified under Section 604 of the Fair Credit Reporting Act. Such procedures shall include but are not limited to those set forth below.

Respondent shall cease and desist from:

1. Failing to require any user such as a private investigative agency or detective, who does not, in the ordinary course of business, regularly extend credit or insurance for personal, family, or household use, to certify either in writing at the time of each request or orally at the time of the request, confirming in writing within ten business days after each oral request:

(a) the specific purpose or purposes for which the reports are sought;

(b) that the information will be used for no other purpose; and

(c) that the user understands that Federal law provides that a person who obtains information from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

2. Failing to consult a listing of all detectives, private investigative agencies, and attorneys found in the current yellow pages of the telephone book of the area where the user conducts business or a similar listing of detectives, private investigative agencies and attorneys, to determine whether a user should comply with the requirements of Paragraph 1.

3. Failing to require all prospective users of information to identify themselves, and certify the purposes for which the information is sought and that the information will be used for no other purpose.

4. Furnishing a consumer report to any person if the respondent has reasonable grounds for believing that the consumer report will not be used for a purpose listed in Section 604.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives and employees.

IN THE MATTER OF

HEATCOOL, INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3102. Complaint, Feb. 1, 1983—Decision, Feb. 1, 1983

This consent order requires a Eugene, Oregon manufacturer and seller of plastic storm windows, among other things, to cease making false or unsubstantiated representations concerning the insulating properties of Heatcool plastic storm windows or any insulating or energy savings device. Further, the company must: (1) notify its distributors that Heatcool plastic storm windows do not insulate better than comparable glass windows and that the window's insulating value is R-1.93; and, (2) include this information in all advertising and promotional literature for a period of one year. The company must also recall promotional and advertising materials which misrepresent the insulating value of Heatcool storm window systems.

Appearances

For the Commission: *Donald Cooper* and *Randall Brook.*

For the respondent: *T.R. Russell, Butler, Hush, Gleaves & Swearinger,* Eugene, Ore.

COMPLAINT

The Federal Trade Commission, having reason to believe that Heatcool, Incorporated ("Heatcool") violated Section 5 of the Federal Trade Commission Act, as amended, issues this complaint and alleges:

PARAGRAPH 1. This action is brought in the public interest.

PAR. 2. Heatcool is an Oregon corporation with its principal office and place of business located at Box 2196, Eugene, Oregon.

PAR. 3. Heatcool manufactures and sells storm windows made from a plastic film, LLumar. Sales of the windows are either made directly or through distributors. Heatcool's business is in and affects interstate commerce.

PAR. 4. Heatcool sells its storm windows based on their thermal insulating value, or "R-value." The R-value is a measure of resistence to heat flows, with higher R-values indicating greater insulating power. A value of R-1 means that the material insulates as well as one inch of wood. A value of R-9 means that the material insulates as well as 9 inches of wood. Standard scientific references indicate that a system of a glass window together with a glass storm window has an insulating value of R-1.93.

COUNT I—*Misrepresentations*

PAR. 5. From October of 1979 until the present, Heatcool has advertised its storm windows as a superior energy saving device. Heatcool has claimed: that its magnetic sealing windows have an insulating value of R–9.17; that its storm windows are approximately four times more effective than glass storm windows; and that its storm windows can reduce heat loss of single glaze windows by a factor of 10.

PAR. 6. Heatcool's representations concerning the insulation value and effectiveness of its storm windows are false. In April 1981, Dynatherm Engineering tested Heatcool's storm windows. Dynatherm is an independent testing laboratory which is accredited for the purpose of testing the insulating value of plastic storm windows. 45 FR 75542, 75544–47 (1980). It found the insulating value of the system consisting of a window and a Heatcool storm window to be R–1.93. A copy of Dynatherm's test result is attached to this complaint as Exhibit A.

PAR. 7. Respondents' false claims have the capacity and tendency to mislead members of the public into believing the claims are true and into purchasing substantial quantities of Heatcool products. The claims are false and deceptive and violate Section 5 of the Federal Trade Commission Act.

COUNT II—*Lack of Substantial Basis*

PAR. 8. Heatcool purchases the basic component of its storm windows—LLumar—from Martin Processing, Incorporated. Martin Processing makes LLumar by impregnating plastic film with an ultraviolet resisting substance. It rates the insulating value of LLumar at R–0.9. By a letter dated June 27, 1979, Martin Processing informed Heatcool that its tests found the insulating value of LLumar to be R–0.9. By applying standard engineering formulae, the expected value for a LLumar storm window plus a regular window would be less than R–2.

PAR. 9. Heatcool refused to accept Martin Processing's insulating value or standard engineering formulae. Instead, it determined to conduct its own tests. For this purpose, Heatcool contracted with Northwest Testing Laboratories, an independent testing lab located in Portland, Oregon. Northwest Testing Laboratories is not accredited for purposes of testing the thermal insulation value of storm windows. *See* 45 FR 75542, 75544–47 (1980).

PAR. 10. Northwest Testing Laboratories tested Heatcool's storm windows in October 1979. It found the insulating value of a window *and* a Heatcool storm window to be R–9.17. Although Northwest Testing Laboratories released this result to Heatcool, it advised the

company that the result could not be used to advertise the storm windows under normal conditions because the test conditions were abnormal.

PAR. 11. The test result of R–9.17 obtained by Northwest Testing conflicted with earlier studies of plastic storm windows conducted by the Department of Energy. The DOE studies found the insulating value of glass window together with a storm window similar to Heatcool's could not be greater than R–2. These test results were published and were available to the general public as of October 1, 1979.

PAR. 12. By March of 1980, Heatcool possessed persuasive evidence that its LLumar storm windows were not superior to comparable glass storm windows. As part of an attempt to sell Heatcool storm windows to the Salt Lake School District, Heatcool had its windows tested by a second testing laboratory, Terralab. Terralab found Heatcool's storm windows did *not* insulate better than comparable glass storm windows. It released the test result to Heatcool in March 1980.

PAR. 13. Heatcool's representations concerning the insulating value and effectiveness of its storm windows were made without a reasonable basis in competent scientific tests. Moreover, respondents knew that the single Northwest Testing Laboratories' test was unreliable, for the reasons stated in Paragraphs 10–12. The practice of making energy savings claims without a reasonable basis in competent scientific tests is unfair and deceptive and violates Section 5 of the Federal Trade Commission Act.

COUNT III—*False Demonstrations*

PAR. 14. In conjunction with its false and unsubstantiated claims, Heatcool put on, or encouraged its distributors to put on, phony demonstrations ostensibly showing that its plastic storm windows were superior to conventional glass storm windows. Appearing at home shows throughout the United States, Heatcool's representatives covered one-half of an open refrigerator with LLumar and the other half with glass. They then invited potential purchasers to touch both the glass and the LLumar. When potential customers found the glass colder to the touch, Heatcool's representatives claimed that this proved that LLumar insulated better than glass. In actuality, the demonstration illustrated that glass has a higher specific heat than LLumar but does not prove anything about the insulating properties of the two materials. Therefore, Heatcool's practice of using, or encouraging the use of, this demonstration is false and deceptive in violation of Section 5 of the Federal Trade Commission Act.

ATTACHMENT A

DYNATHERM ENGINEERING

595 MARSHAN LANE LINO LAKES, MINNESOTA 55014 612/786-1853

NVLAP Accredited by the Department of Commerce, National Voluntary Laboratory Accreditation Program for Performance of ASTM C-236 Guarded Hotbox Tests

PROJECT: 5 mil Clear Film and 2x2 Aluminum Window

DATE: April 9, 1981

LABORATORY NO. 412

REPORTED TO: Metropolitan Denver DA
Consumer and Economic Clime
625 South Broadway
Denver, Colorado 80209
Attention: Energy Fraud Project

COPIES TO:

THERMAL TRANSMITTANCE TEST OF WINDOW WITH INTERIOR FILM

GENERAL:

This report presents the results of one thermal transmittance test made upon nominal 2'x2' single glazed aluminum window unit with 5 mil clear film installed about 4½" interior to the window. It was the purpose of the testing to measure the thermal resistance ("R" value) of the entire system. The window unit and film materials were submitted to the laboratory by CFH Enterprises of Denver, Colorado.

TEST PANEL DESCRIPTION:

Window unit - Nominal 2'x2' single glazed aluminum window unit which was actually about 23-7/16" wide and 23-7/8" high. The unit was manufactured by Croft Metals, Inc. and was Series 10 horizontal sliding window with 2020 mill finish. As seen from the window interior, the left sash was single glazed and fixed, with the right sash also single glazed and moveable horizontally. The sash contained sashlock which was kept in the locked position during the testing. A screen was present on the exterior side of the moveable sash only. The moveable sash was weatherstripped. Both fixed and moveable sash were single glazed, and the frame appeared not to contain any thermal break.

Interior film - The film used was identified as 5 mil clear film by HeatCool Weather Windows of General Purpose Dyed and Weatherized Polyester Films. The actual thickness of a typical section was measured as 4.9 mil and the film had a very slight smoky color. The film was mounted 4½" away from the interior face of the aluminum window unit. Magnetic tape was used to secure the film in place. The film was installed by representative of CFH Enterprises.

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C 236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria

DYNATHERM ENGINEERING

898 MARSHAN LANE
LINO LAKES, MINNESOTA 55014
612/786-1853

page 2 (2x2 alum. window w/interior film)
April 9, 1981
Laboratory No. 412

TEST METHOD:

The thermal transmittance testing was performed using the ASTM C-236 guarded hotbox equipment. The equipment can accept test assemblies up to 7'-2" high and 6'-0" wide and has a centrally located metered area with dimensions of 48" wide and 60" high. Since the test window was smaller than the metered area it was necessary to perform a preliminary test upon a nominal 5" thick expanded polystyrene filler board. The preliminary testing was made under about the same temperature conditions as the testing of the window. The preliminary test was necessary to determine the thermal transmission properties of the filler board. After completion of the preliminary test, a hole was cut in the board just sufficient to install the aluminum window into the opening. Caulking was used to seal the window to the exterior face of the board, and duct tape was also applied to further assure an airtight installation. Representative of CFH Enterprises then installed the magnetic tape and film to the interior face of the filler at the opening. A 4½" space existed between the film and interior face of the window unit.

The testing was performed with the above described test assembly in the vertical orientation, with heat flow horizontal. Very slow moving airflow was used on the interior side with the velocity being about 60 fpm and applied in a downward direction as would occur with natural convection conditions. A nominal 15 mph wind was applied to the exterior side of the window, in an upward direction.

30 gage copper-constantan thermocouples were affixed to various sections on the exterior side of the window, and to various sections of the interior surface of the window. Airspace thermocouples were also used to measure the airspace temperature during test. Surface thermocouples were also installed on the interior side of the film.

After construction of the assembly and attachment of the thermocouples, the assembly was allowed to condition under selected warm and cold air temperatures until steady state heat flow and temperature conditions were achieved. Test data were then taken.

Thermocouple locations were those agreed upon by laboratory personnel and representatives of CFH Enterprises.

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria.

DYNATHERM ENGINEERING

595 MARSHAN LANE
LINO LAKES, MINNESOTA 55014
612/786-1853

page 3 (2x2 alum. window w/interior film)
April 9, 1981
Laboratory No. 412

TEST RESULTS:

Following is a summary of the test results obtained:

Item	Test Results
Heat flow rate, Btu/hr.-sq. ft.	33.78
Warm air temperature, F	102.1
Cold air temperature, F	47.8
Thermal transmittance, U as tested, Btu/hr.-sq. ft.-F	0.622
Overall thermal resistance R_t = 1/U as tested	1.61
Average warm surface temperature, F (film)	86.2
Average cold surface temperature, F	50.7
Mean temperature, F	68.45
Inside surface conductance coefficient, f_i	2.12
Outside surface conductance coefficient, f_o	11.6
Panel conductance, C, Btu/hr.-sq. ft.-F	0.952
Panel resistance, R = 1/C (window-airspace-film only)	1.05
Thermal transmittance corrected to ASHRAE design with 15 mph wind outside, still air inside	0.526
Overall thermal resistance corrected to above ASHRAE conditions	1.9

Sketches showing the locations of surface thermocouples, and the airspace thermocouples are attached. The average measured temperature at each location is also presented.

REMARKS:

The average warm and cold surface temperatures reported above were calculated by "weighting" the measured surface temperatures with the area each represented. The average outside temperature is the outside of the window, and the average warm surface temperature is that of the film interior surface. The mean temperature, inside and outside surface conductance, panel conductance and resistance values were calculated using these average surface temperatures. The overall thermal resistance as tested is the overall thermal resistance, including air films actually developed during testing. The panel resistance is the measured thermal resistance only of the window, airspace, and film without any air films included. The overall thermal resistance corrected to ASHRAE conditions with still air inside and 15 mph wind outside is calculated using the above reported and measured panel

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria.

DYNATHERM
ENGINEERING

895 MARSHAN LANE
LINO LAKES, MINNESOTA 55014

612/786-1853

page 4 (2x2 alum. window w/interior film)
April 9, 1981
Laboratory No. 412

REMARKS (cont'd):

conductance (resistance) and published surface resistances for a vertical, nonreflective surface with heat flow horizontal. A surface resistance of 0.17 was used for the 15 mph wind condition, and a surface resistance of 0.68 was used for the still air condition. The actual surface conductances were higher than the nominal ASHRAE values resulting in a lower overall measured thermal resistance.

The warm and cold air temperatures used in testing, and the application of the exterior 15 mph wind were specified to be used in testing. A nominal 3½" airspace between film and window was desired, but a space of 4½" was used due to availability of 5" beadboard material in the laboratory and to the lack of immediate availability of a 4" filler which would have provided the requested airspace. From various published sources, the difference in thermal resistance between a 3½" airspace and a 4½" airspace would be negligible.

The test results presented are for the window-airspace-film combination, with allowance already made for heat loss through the filler from the results of the preliminary testing. Heat loss through the window alone was calculated as the difference between the total measured with window and that calculated as passing through the filler.

DYNATHERM ENGINEERING

by James P. Anderson

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria

Decision and Order

The Federal Trade Commission initiated an investigation of certain acts and practices of the respondent named in the caption above. The Seattle Regional Office furnished the respondent with a draft complaint that, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act.

The respondent, its attorney, and counsel for the Commission then signed an agreement containing a consent order. In this agreement, respondent admitted all the jurisdictional facts set forth in the draft complaint described above. The agreement states that its signing is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the complaint. The agreement also contains waivers and other provisions required by the Commission's Rules.

The Commission determined that it has reason to believe that the respondent has violated the Federal Trade Commission Act and that the complaint should be issued. The Commission then accepted the consent agreement and placed it on the public record for 60 days. Pursuant to Section 2.34 of its Rules, the Commission now issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Heatcool, Inc. is an Oregon corporation with its office and principal business address at P.O. Box 2196, Eugene, Oregon.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The proceeding is in the public interest.

Order

Applicability of the Order

References in this order to Heatcool apply to any of Heatcool's successors, assigns, officers, agents or employees. The order applies to any subsidiary, division, or other entity related to Heatcool and to Heatcool's advertising, displaying, offering for sale, sale or distribution of Heatcool plastic storm windows or other insulating or energy saving device.

Order Provisions

I. *It is ordered,* That Heatcool cease and desist from representing, directly or by implication, that:

A. Heatcool's plastic storm windows have an insulating value of R–9.17.

B. Heatcool's plastic storm windows insulate approximately four times better than comparable glass storm windows.

C. Demonstrations relating to specific heats show relative insulating values.

II. *It is further ordered,* That Heatcool cease and desist from: making any representation, directly or by implication, regarding the insulating properties of its plastic storm windows or other insulating or energy saving device, unless, at the time the representation is made, it has a reasonable basis in competent scientific tests to believe that the representation is true. For purposes of testing storm windows, a reasonable basis shall consist of tests performed by an accredited lab and shall take into account any information that contradicts or qualifies the tests.

III. *It is further ordered,* That Heatcool immediately recall from all persons or entities that have engaged in advertising, promotion, sale or distribution of its storm windows in the last six months all advertising and promotional materials which represent that Heatcool storm window systems have a total insulating value in excess of R–1.93 or that represent that Heatcool storm windows insulate better than comparable glass storm windows.

IV. *It is further ordered,* That Heatcool prepare and send to all distributors who may reasonably be expected to have purchased Heatcool storm windows within the last six months a clear statement that Heatcool storm windows have an insulating value of R–1.93 and that the windows do not insulate better than comparable glass storm windows.

V. *It is further ordered,* That Heatcool include in its advertising and promotional materials, for the twelve month period after the order becomes effective, a clear and conspicuous statement that Heatcool storm window systems have an insulating value of R–1.93 and do not insulate better than comparable glass storm windows.

VI. *It is further ordered,* That Heatcool maintain complete business records of its compliance with this order. Heatcool shall retain each record for at least three years. Records which provide a reasonable basis for representations of the insulating or energy saving properties of Heatcool products shall be retained for at least two years after the last dissemination of any representation which relies on the records. Heatcool shall make these records, or a photocopy of these records, available to any authorized representative of the Federal Trade Commission within fourteen days after the representative requests the documents.

VII. *It is further ordered,* That Heatcool deliver a copy of this order

to each of its distributors, operating divisions, and affiliated businesses.

VIII. *It is further ordered,* That Heatcool notify the Commission at least thirty days prior to any change in its corporate structure or in its ownership which may affect compliance obligations under this order.

IX. *It is further ordered,* That Heatcool, within 60 days after service of this order, file with the Commission written reports setting forth in detail the manner of its compliance with this order.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9093. Final Order, Sept. 6, 1979—Modifying Order, Feb. 7, 1983

This order reopens the proceeding and modifies the Commission order issued on Sept. 6, 1979 (94 F.T.C. 403), *modified* Aug. 3, 1982 (100 F.T.C. 448), by relieving respondent of its obligation under Paragraph III(A) of the order, to send by first-class mail a copy of Appendix A to the Final Order to each of its current members, and by reducing the number of years that Paragraphs III(A), IV(C), and IV(D) require the association to provide new members with notice of the order; make particular records available to the Commission; and file compliance reports.

MODIFICATION OF DECISION AND ORDER

The American Dental Association ("ADA") has requested that the Commission modify its Final Order in Docket No. 9093 to (1) relieve ADA of its obligation under Paragraph III(A) of the order to send by first-class mail a copy of a letter, Appendix A to the Final Order, to each of its present members, and (2) reduce the number of years ADA is required by Paragraphs III(B), IV(C), and IV(D) to provide new members with notice of the Final Order, make certain records available to Commission staff, and file reports of compliance.

As an alternative to the requirement of Paragraph III(A) that it send separate notice of the Final Order to each of its present members, ADA has proposed that it include an explanatory article when, as required by Paragraph IV(A) of the Final Order, it publishes a copy of the Final Order in the *Journal of the American Dental Association* and *ADA News*. Because under a temporary order ADA provided separate notice to each of its members that it was subject to a Commission order that, except under certain circumstances, prohibited ADA from restricting the advertising of dentists' services, and because with respect to individual members of ADA the Final Order prohibits essentially the same conduct, the Commission has determined that the alternative to separate notice ADA has proposed is in the public interest. The Commission has also determined that it is in the public interest to modify the Final Order to reduce the number of years ADA is required to provide new members with notice of the Final Order, make records available to the Commission, and file compliance reports. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the Final Order be, and it hereby is,

modified by substituting for Paragraphs III(A), III(B), IV(C), and IV(D) of the Final Order, the following:

III.

It is further ordered, That respondent American Dental Association:

A. Send by first class mail a copy of a letter in the form shown in Appendix A to this Order to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

B. For a period of two years, provide each new member of respondent and each constituent and component organization of respondent with a copy of this Order at the time the member is accepted into membership.

IV.

It is further ordered, That respondent American Dental Association:

C. For a period of two years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

D. Within one year after this Order becomes final, and annually thereafter, for a period of one year, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

Commissioner Pertschuk dissented.

SEPARATE STATEMENT OF CHAIRMAN MILLER

The petition of the ADA to modify the compliance burdens in its order boils down to two issues, both of which lead me to clear and obvious answers. The first issue arises from the settlement the ADA reached with the Commission in 1979. The Commission agreed with the ADA that it would be treated on equal terms with the order

ultimately reached with the AMA. Then for three years, the ADA operated under a temporary order that imposed essentially the same burdens as the final order. But the final order does not recognize the three years of compliance that the ADA performed while the *AMA* case was pending. I have no trouble deciding that the ADA should not incur three extra years of expensive compliance because it settled with the Commission.

The second issue concerns the purpose of reporting and record-keeping under Commission orders. Unlike the provisions relating to lawful conduct, which are perpetual in this order, the compliance requirements run for a term of several years. The ADA was required, for example, to provide copies of the order to all new members for ten years. Such compliance procedures are typically held to a limited term for an economic reason: the balance between the costs of the procedure and the probability of harm from noncompliance. While the Commission may expect that a respondent will comply immediately, there remains a chance that it will not. As the respondent gains experience in complying with an order over time however, the likelihood of future problems diminishes. The Commission limits the term for such expensive procedures as reporting, notifying and record-keeping because at some point the probability of a problem arising will no longer justify the extra expense of special monitoring for it.

The Commission originally determined that it would take ten years before the notice to new members had served its remedial purpose. However, the developments in the market for dental services and ADA's past compliance with its order demonstrate to my satisfaction that we can revise this assessment. The likelihood that future dental school graduates will violate the Commission order is sufficiently remote that the expense of continuing to mail it beyond five years does not appear justified. Therefore, I support the Commission's decision to reduce the notice requirement from ten years to five.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I dissent from the decision of the Commission to reduce the period for which ADA is obligated to inform new members of the order, to make compliance reports available, and to make records available to the Commission. As I understand it, ADA's principal grounds for modification are: 1) ADA is obligated to carry out these obligations longer than the AMA even though the ADA settled and the AMA litigated its case to the Supreme Court; 2) ADA has complied with the order faithfully during the interim period (before the AMA order was finalized) and should get credit for this period; and 3) there is less need to give notice to new members since the legal standard for advertising

has changed and new members will, therefore, be less likely to reintroduce restrictions. While the Commission, in granting the petition, appears to place reliance on all three of these factors, none actually meet the standard of Rule 2.51—that changed conditions of law or fact or the public interest "requires" the order to be modified.

ADA agreed at the time the interim order was entered to be bound by an order identical—with one exception—to any final order in the AMA case. This eventual identity of orders meant ADA would have to comply with notice and reporting requirements for the period required by the interim order *plus* the period required by the AMA order.[1] Consequently, the period required for notice and reporting can hardly be called unfair or unanticipated. As for the supposed change in advertising law, the antitrust and constitutional problems in restricting advertising were well known before the ADA order was entered and, in fact, the cases ADA cites in support of its petition—except for the AMA case itself—were decided before the interim order issued.

The Commission appears to shorten ADA's requirements principally on theory that it has made a quicker than expected transition to full compliance with the order. Chairman Miller's statement, in fact, suggests that the Commission thought in 1979 that it would take an extended period for the ADA to undergo a total transition to compliance. This idea is troubling in two respects. First, the ADA order includes at least one substantive provision concerning disciplining member societies which was not in the interim order and for which we have no compliance record. More importantly, the idea that we should shorten the period of notice and reporting obligations as a reward for a rapid *transition* to compliance does not strike me as satisfying the "changed conditions of law or fact" or "public interest" requirement within the meaning of Rule 2.51. We expect immediate compliance with orders (subject to any express grace periods) and bringing an organization into conformity with order obligations in a short period of time has, heretofore at least, not been grounds to shorten compliance requirements. While the low probability of ADA violating the order is all to the good, that is precisely what we expected when the order was issued. Consequently, I would have agreed with the Bureau of Competition that the period for notice and reporting be left unchanged.

[1] The ADA not only wants to cut back the period for giving notice to take into account the three year period of the interim order but also to cut back the total notice period to five years, instead of the ten now required in both the AMA and the ADA orders.

IN THE MATTER OF

G C SERVICES CORP., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR DEBT COLLECTION PRACTICES ACTS

Docket C-2511. Consent Order, April 16, 1974—Modifying Order, Feb. 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on April 16, 1974 (83 F.T.C. 1521), *modified* June 21, 1978 (91 F.T.C. 1150), by deleting Paragraph Six from the order and substituting a new Paragraph Six, which incorporates restrictions concerning the use of post-dated checks contained in Section 808(2), (3) and (4) of the Fair Debt Collection Practices Act.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

By petition filed September 21, 1982, pursuant to Rule 2.51, petitioners G C Services Corporation and Jerold B. Katz, William A. Inglehart and Martin M. Katz, ("GCSC"), request the Commission to reopen this proceeding and modify Paragraph 6 of the Order to Cease and Desist issued on April 16, 1974, and amended on June 21, 1978.

Paragraph 6, as written in the original 1974 Order, prohibited GCSC from receiving from debtors post-dated checks which would not be deposited immediately or which would be held for more than 15 business days after their receipt. On June 21, 1978, the Commission modified this Order Paragraph to permit GCSC to hold debtor's checks up to 60 days provided GCSC complied with certain conditions, including the requirement that GCSC make a good faith effort to reach debtors by attempting to contact them by telephone three times to obtain their permission to deposit any post-dated checks.

The present petition seeks modification of Paragraph 6 by eliminating, 1) the 60 day period limitation for GCSC's holding of post-dated checks and 2) the telephone contact requirement. In place of the current Paragraph 6, GCSC requests that the Section 808(2), (3) and (4), of the FDCPA, as well as other requirements, be incorporated into the Order. In addition to being bound by the FDCPA requirements, GCSC requests that the Order prohibit respondents for a period of 5 years from accepting a check post-dated by more than 60 days unless the debtor is given, along with the notice required by Section 808(2) of the FDCPA, a notice, a) of the date and amount of each additional post-dated check that GCSC holds and intends to cash and b) that advises the debtor to contact GCSC in the event the debtor is unable to cover the check to arrange a revised payment schedule. Additional-

ly, GCSC would be required to return to the debtor, when so asked, any post-dated check that the debtor is unable to cover.

In support of their request, petitioners assert that the current restrictions in Paragraph 6 are unnecessary in view of the requirements and restrictions set forth in Section 808 of the FDCPA which are binding on GCSC as a debt collector. The current Order restrictions on GCSC, petitioners argue, places them at a competitive disadvantage. Further, the telephone debtor contact required by the current Paragraph 6 is not only burdensome to GCSC but bothersome to consumers as well.

The Commission, having considered the petition, is of the opinion that petitioners have made a sufficient showing of changed conditions of law and fact to reopen the proceeding, and have decided to grant their request. However, the Commission is persuaded that incorporation of Section 808(2), (3) and (4) into the Order would provide adequate protection for consumers and that the additional restrictions proposed by petitioners are not necessary. Petitioners have agreed to this change.

Accordingly, *it is ordered* that the proceeding be, and it hereby is reopened.

It is further ordered, That the Order to Cease and Desist be, and it hereby is, modified by striking Paragraph Six, amended on June 21, 1978, and substituting therefor the following:

6. (a) Accepting from any person a check or other payment instrument post-dated by more than five days unless such person is notified in writing of the intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;

(b) Soliciting any post-dated check or other post-dated payment instrument for the purpose of threatening or instituting criminal prosecution;

(c) Depositing or threatening to deposit any post-dated check or other post-dated payment instrument prior to the date on such check or instrument.

IN THE MATTER OF

AHC PHARMACAL, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3017. Consent Order, April 28, 1980—Modifying Order, Feb. 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on April 28, 1980 (95 F.T.C. 528), by relieving respondent of the obligation of disseminating corrective advertisements which state that "no product can cure acne" prior to disseminating advertisements for "AHC Gel" or any acne product or regimen. In addition to the two well-controlled, double-blind clinical studies previously required for all superiority claims, the modified order now permits respondents to rely on FDA Panel recommendations as a reasonable basis for substantiating superiority claims.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

AHC Pharmacal, Inc., and James E. Fulton, M.D., (hereinafter "Petitioners") have filed, pursuant to Rule 2.51 of the Commission's Rules of Practice, a Request for Modification of Order, including a request to vacate (hereinafter "Petition").

Petitioners seek the modification or elimination of two provisions of the Commission's Order of April 28, 1980. Petitioners also ask that the action be dismissed and the Order vacated.

The Order concerns Petitioners' representations as advertisers of an acne product and a regimen, and requires them to disseminate corrective advertisements that "no product can cure acne" before engaging in any advertising.

The initial request of July 7, 1982, seeks the modification of the Order in two respects: (1) Petitioners seek to change the format and the media of the corrective advertising required under the Order, and (2) presumably as an alternative, they allege that the basis of the Commission's Complaint is now moot in view of a recent report by a panel of FDA experts and argue that the Commission action should be dismissed and the Order vacated.

Additional issues raised by Petitioners' letter of August 27, 1982, include (3) a charge that their constitutional rights of due process and equal protection are being violated by the Order requirement of double-blind clinical studies to support efficacy claims, and (4) an allegation that a new acne product on the market may, in fact, cure acne, which renders the requirement of the corrective message "no product can cure acne" factually and legally erroneous.

The first issue raised by Petitioners concerns the breadth and frequency of the corrective advertising and the advertising media to be used. Petitioners seek to change the requirement of the Order to disseminate corrective advertising in Sunday newspaper supplements and on radio and to substitute therefor a brochure soliciting mail orders to be sent to at least 20,000 consumers who are potential purchasers of the product.

In support of this portion of the request Petitioners have shown that changed financial conditions of the corporate respondent now prevent it from being able to pay for the cost of such advertising. They further submit that the direct mailing of a less expensive brochure bearing the corrective message to the very consumers who may have been previously exposed to the now prohibited advertising would be more in keeping with the spirit of the Order.

However, Petitioners also argue that the passage of time supports their contention that the corrective advertising requirement be eliminated. There is no evidence before us as to what, if anything, the public recalls of the original advertising, and whether the public perception of the product is still tainted by the claims of "cure" and "superiority." Respondents argue that during the four years when they chose not to advertise at all whatever "lingering effect" the previous claims may have had was dissipated and, therefore, lessened the need for corrective advertising.

Additionally, an argument is made by the Petitioners that a new drug, Accutane, recently approved by FDA for acne treatment, "may, in fact, cure acne." Therefore, the argument continues, the Commission should no longer require the respondents to disseminate a statement ("no product can cure acne") that may be "factually and legally erroneous."

The Commission is persuaded by the evidence of changed financial circumstances and the argument about the passage of time that modification of the Order is warranted. Moreover, without reaching the question as to whether any product may, in fact, cure acne, the Commission is of the opinion that under the facts of this case it will not be against the public interest to relieve Petitioners from the requirement of the corrective message. 15 U.S.C. 45(b) and 16 C.F.R. 2.51.

The second issue raised by Petitioners is the publication by the Food and Drug Administration ("FDA") of advance notice of proposed rulemaking for Topical Acne Drug Products for Over-the-Counter Human Use, 47 FR 12430, (March 23, 1982) (to be codified at 21 C.F.R. 333), and the recommendation of an Advisory Review Panel contained therein. Petitioners assert that since certain labeling representations regarding products containing benzoyl are now acceptable to the Pan-

el, and since benzoyl is the active ingredient of Petitioners' products, the basis for the Commission's original Complaint is now moot and that consideration should be given to dismissal of the action and the vacating of the Order.

The Panel report referred to by the Petitioners is a part of a proposed rulemaking by the Food and Drug Administration that would establish conditions under which over-the-counter (OTC) acne drug products are generally recognized as safe and effective and not misbranded. FDA published an advance notice of the proposed rulemaking on March 23, 1982. The notice is based on the recommendations of the Advisory Review Panel on OTC Antimicrobial (II) Drug Products.

The Panel has reviewed the literature and data submissions and has listened to testimony of interested persons. Numerous manufacturers of acne preparations submitted their products. AHC Pharmacal submitted "bp Gel Medication" and "bp Gel Medication Strong."

The Panel recommends three category conditions. Category I Conditions are those under which OTC acne drug products are generally recognized as safe and effective and are not misbranded. Category II Conditions are those under which OTC acne drug products are *not* generally recognized as safe and effective or are misbranded. Category III encompasses products for which insufficient data precludes final classification at this time.

The Panel concluded that benzoyl peroxide in concentrations of 2.5 to 10 percent is one of the two active ingredients that are generally recognized as safe and effective (Category I) in treatment and prevention of acne.

The Panel recommends numerous acceptable phrases to be used in labeling for products effective in the treatment of acne, in the prevention of new acne lesions, and in antibacterial claims.

The Commission finds insufficient basis in the Panel's report to support Petitioners' contention that the basis for the Commission's original action is now moot and that the Order should be vacated.

The gravamen of the Commission's Complaint is the allegation concerning the unqualified claim for the effectiveness of Petitioners' product and regimen. The Complaint alleges that the advertisements claim, directly or by implication, that the respondents' product or regimen will cure acne and is superior to other products on the market.

The Panel's recommendations of acceptable language are carefully drawn. Absolute claims are not recommended. The Panel's recommendations do not support the Petitioners' contention that "the basis of the Commission's original complaint is now moot. . . ." The Panel's recommendations do not directly contradict Parts I.A. and B.1. of the

Order that clearly prohibit "cure" claims by Petitioners. Given the claims alleged in the Complaint, the Commission believes the Panel's recommendations provide no basis to support Petitioners' argument that the Order should be vacated.

The Commission is willing to vacate an order upon a showing that changes in fact or law or the public interest make the continuation of an order unnecessary. Petitioners have failed to show such changes in the instant case. For example, they have not demonstrated that the Commission would interpret their advertisements any differently today than when the order was issued, nor have they provided copy tests or other extrinsic evidence demonstrating that the advertisements do not make the claims the Commission prohibited. Moreover, the Commission finds no basis in the public interest for vacating this order.

Petitioners finally argue that the requirement of the double-blind clinical studies for claims that the product results in a skin free of pimples, blackheads, etc., is a violation of "due process and equal protection" since the Panel concluded that products containing benzoyl peroxide "can be represented . . . without any testing whatsoever."

None of the recommended representations in the Panel's list permits a sweeping, unqualified claim of "skin free of pimples, blackheads, etc." The Panel recommends as acceptable such qualified labeling claims as "Clears up most acne pimples", "Clears up most acne blackheads", and similar qualified representations if descriptive of products effective in the treatment or prevention of acne.

Moreover, having signed the Consent Order in this matter, Petitioners waived any right to seek judicial review or otherwise to challenge or contest the validity of the order. 16 C.F.R. 2.32. Accordingly, we do not reach the argument of the denial of due process and equal protection, advanced by the Petitioners.

Nevertheless, it is in the public interest that Petitioners should be permitted to make claims about their products that their competitors may make, if supported by a reasonable basis; including superiority claims, if properly supported by such an authority as the recommendation of the Panel. For example, whatever implications of superiority there may be in a claim that benzoyl peroxide has been found safe and effective by the Panel while an ingredient classified by the Panel as Category II has been found unsafe or ineffective, those implications are adequately substantiated by the findings and conclusions of the Panel. The Order will be modified accordingly. In continuing to require two well controlled double-blind clinical studies for all superiority claims not supported by the FDA or its Panel, the Commission, of course, expresses no view on the broader question of whether that

level of substantiation would be an appropriate requirement for all comparative claims for all drugs or other products.

Petitioners have failed to show other changes in fact to warrant any other modification of the Order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued April 28, 1980, in Docket No. C–3017 is hereby modified to read as follows:

Order

I

It is ordered, That respondents AHC Pharmacal, Inc., a corporation, and James E. Fulton, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel") either alone or as part of "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen") or any other acne product or regimen will cure acne or any skin condition associated with acne;

2. Misrepresents the extent to which any product has been tested or the results of any such test(s);

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "AHC Gel", either alone or as part of "the Acne Control Regimen", or use of any other acne product or regimen by persons with acne, will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, or scarring;

2. Represents that "AHC Gel", either alone or as part of "the Acne Control Regimen", or any other acne product or regimen, is superior to other over-the-counter acne preparations for the treat-

ment of acne, including but not limited to other benzoyl peroxide products,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). ("Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies. *Provided, however,* That the findings and conclusions of the FDA Advisory Review Panel on OTC Antimicrobial (II) drugs as published in 47 FR 12430 *et seq.* (March 23, 1982), unless and until any such finding or conclusion shall be modified by the FDA, and in that event, such finding or conclusion as modified, shall also constitute "competent and reliable scientific or medical evidence.");

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

II.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

III.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

IV.

It is further ordered, That such respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

V.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

Petitioners' request for other modification of the Order and for dismissal of the action and vacating of the Order is hereby denied.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

Commissioners Pertschuk and Bailey voted in the negative.

SEPARATE STATEMENT OF COMMISSIONER DAVID A. CLANTON ON ORDER MODIFICATION IN AHC PHARMACAL, INC.

The Commission today issued an order modifying the corrective advertising and substantiation requirements of a 1980 Consent Order entered into with AHC Pharmacal, Inc. In a separate statement, Commissioner Pertschuk expresses concern that the newly modified order might give the respondent room to make claims for which there is little or no scientific basis.

In point of fact, the modified order does no such thing. As Commissioner Pertschuk's statement might suggest to the respondent that it is free to make certain claims that are still prohibited, I have taken this opportunity to correct that misimpression.

The original order, entered in 1980, prohibited the respondent from making certain claims unless they were supported by "competent and reliable scientific or medical evidence." No FDA panel had examined the efficacy of acne remedies at that time, so scientific or medical evidence was defined to require two well-controlled clinical studies.

Recently, however, an FDA Advisory Review Panel concluded an investigation and published its findings on the safety and efficacy of various acne remedies. The sole effect of our order modification is to

provide that those findings would also be considered "competent and reliable scientific or medical evidence." The FDA panel was composed of leading experts in the field of antimicrobial drugs, and there has been no suggestion anywhere in these proceedings that the panel's findings were incompetent or unreliable. Thus, the respondent may now make a claim if it is supported either by two well-controlled clinical studies *or* by the findings of the FDA panel.

However, it is important to point out that claims which are *not* supported by such evidence are still prohibited. The order should not be read as providing the respondent with a "zone of play," permitting any claim which even looks as though it might be supported by the panel's findings, any more than the original order would have permitted a claim which only looked as though it might be supported by two clinical tests. Unless a claim is in fact confirmed, either by the conclusions of the FDA panel or by two independent clinical tests, that claim is still prohibited.

Thus, I cannot share Commissioner Pertschuk's concern (at p. 2 of his statement) about advertisements which might imply that a 10% benzoyl peroxide solution was generally more effective than a product containing only a 2.5% solution. As Commissioner Pertschuk correctly points out, the FDA panel did *not* find that a 10% solution was more effective than a 2.5% solution for most acne sufferers, so any implied claim to the contrary would not be supported by the panel's findings. Accordingly, any advertisement which made such an implied claim would still violate the order.

The same answer applies to the concern (again at p. 2) that the respondent could argue that the panel's findings would support a claim that the product would result in a skin "free of pimples." The truth is that nothing in the panel's conclusions would support such an unqualified claim. Indeed, this was one of the claims involved in the original complaint, and the Commission's modifying order explicitly states that "the panel's recommendations do *not* support the petitioner's contention" that such a claim would now be permissible. (Order at p. 4; emphasis added). If this were not clear enough, the modifying order later repeats that "none of the recommended representations in the panel's list permits a sweeping, unqualified claim of 'skin free of pimples, blackheads, etc.' " (*Id.*) There thus is no basis for even suggesting that such claims would now be permitted under the modified order.

In short, Commissioner Pertschuk is simply incorrect to the extent that he implies that the modified order might permit any claims, express or implied, that were not directly supported by the panel's findings and conclusions (or by two clinical tests). The petitioner would be well advised not to place any reliance on such suggestions.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK ON ORDER MODIFICATION IN AHC PHARMACAL

The modified order adopted today by the Commission ostensibly retains the order's provision requiring the petitioner to have clinical tests to prove claims that its product would give buyers a "skin free of blemishes" or that its product is superior to other OTC acne medications. But the Commission now has introduced a large area of uncertainty about which claims require clinical testing by AHC and which claims do not.

Under the proposed modification, petitioner can make any superiority claim which is based on the "findings and conclusions" of the FDA panel. Instead of limiting therapeutic superiority claims to a narrow class of claims which are adequately supported by scientific proof, this order modification threatens to enlarge the "zone of play" in which a seller can make a spurious claim and effectively protect itself from prosecution by cloaking itself in the protective mantle of the FDA panel's findings. It allows advertisers to lift the FDA panel's "findings" out of the narrow specific context in which they were made and use them to make comparisons between products—comparisons which the FDA itself does not allow.

Let me just provide one example. When the FDA finishes its OTC acne drug review, only those products which are found by FDA to be "safe and effective" can be sold. How then is the poor marketer to convince consumers to buy its product rather than its competitors'? Based on the history of OTC drug advertising, I confidently predict that advertisers will resort to spurious differentiations, all of which will imply that their products are actually better than the others. The proposed modification will certainly invite such claims. Take, for example, the following cautiously phrased "finding" of the FDA panel:

> The Panel recognizes that acne represents a spectrum of severity . . . The Panel feels that higher concentrations of benzoyl peroxide may be suitable for severe acne or for mila [*sic*] acne lesions that have not responded to lower concentrations. [2]

What kinds of superiority claims does that "finding" support? How about:

> Forget those sissy 2.5% benzoyl peroxide solutions! When you're really *serious* about acne, try "Big 10"—the acne medication with more than 3 times as much benzoyl peroxide as the best seller!

Most sufferers of acne would clearly interpret that to mean that the 10% solution is much more effective than a 2.5% solution. Yet the

studies reviewed by the FDA panel found that for most acne sufferers, the 2.5% solution of benzoyl peroxide was *just as effective* as the 10% solution, while causing less severe and less frequent side effects. But is the claim also supported by the FDA panel's "findings" cited above?

Nor is this concern altogether theoretical. The petition itself states that the requirement to conduct clinical tests to support claims that its product will result "in a skin free of pimples, blackheads, etc, is totally out of touch with the FDA's expert panel's conclusion that benzoyl peroxide containing products can be represented for such results without any testing whatsoever," and "it appears that the very advertising which the Commission complained of in 1978 is now acceptable labeling claims to the FDA's expert panel."

I would support a modification which spells out exactly the types of claims which are supported by the FDA panel's findings. For example, the FDA panel's findings do provide a scientific basis for petitioner—or any other OTC acne drug seller—to claim that products with benzoyl peroxide or sulfur (the only two ingredients found by the FDA to be safe and effective) are therapeutically superior to products with only those ingredients found by the FDA generally not to be safe and effective. The principal deficiency in the Commission's modification is its failure to make clear which claims are supported by the FDA panel and which claims are not. The result is to invite the spurious differentiations discussed above, or, at the least, to leave ourselves open to future disputes which can only be resolved by enforcement proceedings.

In my view, the Commission, in adopting this modification, simply begins to unravel what has been a useful, understandable, and justifiable standard for substantiation of OTC drug comparison claims.

In the Matter of

CONAGRA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3103. Complaint, Feb. 16, 1983—Decision, Feb. 16, 1983

This consent order requires an Omaha, Neb. manufacturer and seller of bakery and hard wheat flour, among other things, to timely divest seven specified flour production facilities to a Commission-approved buyer(s), capable of maintaining the facilities as competitive entities. Additionally, the order prohibits the company from acquiring, for a period of ten years, any interest in any flour milling plant in eleven western states without prior Commission approval.

Appearances

For the Commission: *John Peterson.*

For the respondent: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz,* New York City.

Complaint

The Federal Trade Commission, having reason to believe that the above-named Respondent, subject to the jurisdiction of the Commission, has acquired stock and assets of Peavey Company in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

Definitions

For purposes of this complaint the following definitions shall apply:

Bakery Flour means hard wheat flour, soft wheat flour and whole wheat flour sold generally to bakeries and institutional users.

Hard Wheat Bakery Flour means flour milled from hard wheat, which is sold generally to bakeries and institutional users to make white pan bread.

ConAgra Incorporated

1. Respondent ConAgra, Inc. (ConAgra) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 200 Kiewit Plaza, Omaha, Nebraska.

2. ConAgra manufactures and sells bakery flour and hard wheat bakery flour from 15 mills located throughout the United States.

3. In its fiscal year ended May 31, 1981, ConAgra had total sales of approximately $1,376,808,000. Its sales of bakery flour for 1981 totaled $280,375,338.

Peavey Company

4. Prior to the merger, Peavey Company was a corporation organized under the laws of the State of Minnesota, with its principal place of business at Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota.

5. Prior to the merger, Peavey manufactured and sold bakery flour from eight mills located throughout the United States.

6. In its fiscal year ended July 31, 1981, Peavey had total sales of approximately $820,884,000. Its 1981 sales of bakery flour were $301,735,606.

Jurisdiction

7. At all times relevant herein ConAgra and Peavey were engaged in the manufacture and sale of bakery flour in interstate commerce and were engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

The Merger Agreement

8. On or about April 18, 1982, ConAgra and Peavey entered into an agreement in principle which provides, *inter alia,* for the acquisition by ConAgra of the stock and assets of Peavey. The transaction was consummated on or about July 20, 1982.

Trade and Commerce

9. A relevant line of commerce is the manufacture and sale of bakery flour.

10. A relevant line of commerce is the manufacture and sale of hard wheat bakery flour.

11. A relevant section of the country or geographic market is the Western States market, divided by the Eastern border of the States of Montana, Wyoming, Colorado and New Mexico and consisting of the States of Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Arizona, Nevada, California, Oregon and Washington.

12. The manufacture and sale of bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 65%. Peavey is the largest firm with approximately 24.3% of the market. ConAgra ranks fourth with approximately an 8.5% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1794.4, having increased as a result of the merger by 413.

13. The manufacture and sale of hard wheat bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 64.3%. Peavey is the largest firm with approximately 23.1% of the market. ConAgra ranks third with approximately an 11.1% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1845.0, having increased as a result of the merger by 512.8.

14. There are barriers to entry into the manufacture and sale of bakery flour and hard wheat bakery flour.

Actual Competition

15. Prior to the merger, ConAgra and Peavey were for many years actual competitors of each other in the manufacture and sale of bakery flour and hard wheat bakery flour and actual competitors of others engaged in the manufacture and sale of bakery flour and hard wheat bakery flour throughout the Western States market.

Effects; Violations Charged

16. The effects of the acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between ConAgra and Peavey in the manufacture and sale of bakery flour and hard wheat bakery flour has been eliminated;

(b) actual competition between competitors generally in the manufacture and sale of bakery flour and hard wheat bakery flour may be lessened;

(c) Peavey has been eliminated as an actual substantial independent competitor in the manufacture and sale of bakery flour and hard wheat bakery flour.

Commissioner Bailey voted in the negative. Commissioner Douglas did not participate.

Decision and Order

The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition of the stock and assets of Peavey Company ("Peavey") by ConAgra, Inc. ("ConAgra"), and ConAgra having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge ConAgra with violations of the Federal Trade Commission Act and the Clayton Act; and

ConAgra, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by ConAgra of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by ConAgra that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that ConAgra has violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. ConAgra is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices at One Central Plaza, Omaha, Nebraska.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of ConAgra and the proceeding is in the public interest.

Order

For purposes of this Order,

(a) *ConAgra* means ConAgra, Inc., its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(b) *Peavey* means Peavey Company, its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(c) *Salt Lake City Plant* means the assets acquired by ConAgra from Peavey that are located in Salt Lake City, Utah, and that are used in the production of wheat flour;

(d) *Ogden Plant* means the assets acquired by ConAgra from Peavey that are located in Ogden, Utah, and that are used in the production of wheat flour;

(e) *Billings Plant* means the assets acquired by ConAgra from Peavey that are located in Billings, Montana, and that are used in the production of wheat flour;

(f) *Great Falls Plant* means the assets of ConAgra that are located in Great Falls, Montana, and that are used in the production of wheat flour;

(g) *San Francisco Terminal* means the bulk flour terminal, acquired by ConAgra from Peavey that is located at 790 Pennsylvania Street, San Francisco, California;

(h) *Standard Flour* means the flour distribution plant known as Standard Flour, acquired by ConAgra from Peavey, that is located at 6414 Gayhart Street, City of Commerce, California;

(i) *Coast-Dakota* means the baking mix plant and flour distribution plant, acquired by ConAgra from Peavey, that are located at 2430 Union Street, Oakland, California, and 400 Oak Street, Oakland, California;

(j) *Facilities* means the Salt Lake City Plant, the Ogden Plant, the Billings Plant, the Great Falls Plant, the San Francisco Terminal, Standard Flour and Coast-Dakota; and

(k) *Western Region* means the States of Oregon, Washington, California, Arizona, New Mexico, Nevada, Utah, Wyoming, Colorado, Idaho and Montana.

I

It is ordered, That within fifteen (15) months of the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, ConAgra shall divest the Facilities absolutely and in good faith to one or more third parties that represent that they intend to use the Facilities in the production of wheat flour. Pending divestiture, ConAgra shall neither make nor permit any deterioration of the Facilities, except for normal wear and tear, that might impair their operating abilities, competitive viability or market value.

II

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, ConAgra shall not acquire, without the prior approval of the Federal Trade Commission, directly or indirectly, any stock, assets, or interest in any flour milling plant located in the Western Region; *provided, however,* that nothing in this Paragraph II shall prohibit ConAgra from acquiring in the ordinary course of business used equipment for the milling of wheat flour.

III

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until ConAgra has fully complied with the provisions of Paragraph I of this Order, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. All compliance reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of plants pursuant to Paragraph I of this order, and the identity of all such parties. ConAgra shall furnish to the Federal Trade Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth the manner and form in which it has complied or is complying with Paragraph II of this Order.

IV

It is further ordered, That ConAgra notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in ConAgra, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Bailey voted in the negative; Commissioner Douglas did not participate.

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9118. Complaint, Oct. 18, 1978—Final Order, Feb. 17, 1983

This Final Order, among other things, prohibits an Anderson, Ind. dental association ("IFD") from engaging in any action or course of conduct having the effect of requiring or organizing dentists to refuse to submit radiographs or other materials requested by third-party payers for use in benefit determinations or to deal with a third-party payer in a certain way. The order also forbids IFD from engaging in any action that compels a third-party payer to deal with or to operate in a certain way in connection with dental health care benefits programs; or whose purpose is to influence a consumer's choice of dentists based on the degree of non-cooperation between such dentists and a third-party payer. Additionally, the association is required to timely mail to each of its members a copy of the Commission order together with a letter advising that IFD has abandoned all policies and guidelines that fail to conform to the provisions of the order, and that members are free to deal with dental health care programs and payers as they see fit.

Appearances

For the Commission: *L. Barry Costilo, M. Elizabeth Gee, James McCarty* and *Laurel Brandt.*

For the respondent: *Ronald K. Fowler,* Anderson, Ind. and *Bruce W. Graham,* West Lafayette, Ind., intervenor for State of Indiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint. *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Indiana Federation of Dentists ("IFD") is an unincorporated association with its principal place of business at 2403 Raible Ave., Anderson, Indiana. The IFD is composed of dentists licensed to practice dentistry in the State of Indiana and has approximately 250 members.

PAR. 3. The Indiana Dental Association ("IDA"), is an Indiana corporation with approximately 2000 members, all of whom are licensed to practice dentistry in Indiana. IDA charters, and is divided into, geographic component societies. Membership in a component society is a condition of membership in IDA.

PAR. 4. Members of respondent and of IDA are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dentists. [2]

PAR. 5. Among respondent's objectives is representation of dentists in socio-economic matters, as a result of which respondent is a corporation organized to carry on business for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In 1976, total expenditures for dental health care services in the United States were approximately $8.6 billion. The annual rate of expenditure in Indiana is at least $150 million.

PAR. 7. In the course and conduct of their businesses, members of respondent, among other things,

(A) Receive substantial revenue from private third-party payers and from the Federal Government in payment for rendering dental health care services, which money flows across state lines;

(B) Provide dental health care services to patients who receive reimbursements from private third-party payers and from the Federal Government for payments made for such services, which reimbursements flow across state lines;

(C) Receive and treat patients from states other than Indiana; and

(D) Utilize and prescribe drugs, medicines, and other products which are shipped in interstate commerce;

as a result of which the acts and practices herein below alleged are in or affect commerce within the meaning of the Federal Trade Commission Act, and respondent is subject to the jurisdiction of the Federal Trade Commission.

PAR. 8. A substantial portion of the population of Indiana is covered by dental health care benefits programs administered by third-party

payers. Many of such programs include provisions for determination of benefits in advance of treatment ("predetermination") and limitation of coverage to the least expensive adequate course of treatment, with a requirement that radiographs ("X-rays") be submitted to aid in benefit determination. The purpose of such provisions is to contain the cost of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 9. Since at least 1961, IDA, its component societies, and their members have engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation by dentists with dental health care benefits programs containing predetermination and least expensive adequate course of treatment [3] provisions. In the course thereof, IDA, its component societies, and their members in concert and agreement among themselves, and with IFD and its members, as hereinbelow alleged, *inter alia:*

A. Promulgated and distributed to their members guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines and principles;

B. Encouraged and induced their members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefits determination;

C. Conducted meetings, workshops, and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

D. Urged dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and

E. Urged payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that they find unacceptable.

PAR. 10. In or about September 1976, respondent was organized and founded by dentists, at least some of whom were or had been members or officers of IDA. In or about September 1976, respondent announced its intention to adopt and pursue the purposes of the agreement and concert of action alleged in Paragraph Nine.

PAR. 11. Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs

containing predetermination and least expensive course of treatment provisions by, *inter alia:*

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and [4]

B. Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that respondent finds unacceptable.

PAR. 12. The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;

B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;

C. Consumers have been or may be deprived of the benefits of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;

D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and

E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

PAR. 13. The aforesaid acts and practices of respondent constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, and are within the scope of Section 5(m)(1)(B) of said Act.

INITIAL DECISION BY

PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

MARCH 24, 1980

I. SUMMARY OF PROCEEDINGS

On 10/18/78 the Commission issued its complaint against the Indiana Federation of Dentists (IFD), a small unincorporated association organized in 1976. The complaint was served on Indiana Federation of Dentists at its office at 2403 Raible Ave. in Anderson, Indiana on 11/13/78. The complaint charged the Federation and its members, in substance, with adopting and pursuing a conspiracy started some years earlier by the much larger Indiana Dental Associa-

tion (IDA), which was named here as a co-conspirator but not as a Respondent.[1] The conspiracy charged centers about an organized effort to keep Indiana dentists from turning over patients' dental radiographs (commonly called X-rays) to group dental health care insurers. The principal terms of the alleged conspiracy are described in Paragraph 9 as follows:

A. Promulgated and distributed to their members guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines and principles;

B. Encouraged and induced their members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefits determination;

C. Conducted meetings, workshops, and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

D. Urged dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and [2]

E. Urged payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that they find unacceptable.

Paragraph 11 of the Complaint added the following:

Since September 1976, respondent and its members, in concert and agreement among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs containing predetermination and least expensive course of treatment provisions by, *inter alia:*

A. Promulgating, adopting, publishing, and distributing to its members a purported "work rule" that details certain uniform courses of conduct for dentists in their dealings with third-party payers; and

B. Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that respondent finds unacceptable.

(The complaint regularly refers to "third-party payers" rather than "insurers" but we use the term "insurer" as following popular usage more closely.)[2]

The conspiracy is said to have adversely affected competition among Indiana dentists; tended to fix or tamper with the price of dental health care in Indiana; deprived consumers of the benefit of insurers' cost-containment efforts; deprived them, too, of the benefit of a second dentist's opinion on the adequacy of proposed dental treat-

[1] At the same time that the Commission issued this complaint it accepted a consent order from IDA in Docket No. C–2957. *See Federal Register,* Vol. 43, No. 223—Friday, November 7, 1978 [93 F.T.C. 392].

[2] Technically a cost-plus group insurer is probably not an "insurer" because the Supreme Court views the spreading and underwriting of risk as the "primary elements" of insurance. *See Group Life & Health Ins. Co.* v. *Royal Drug Co.,* 440 U.S. 205, 211 (1979).

ment; and limited their opportunity to select dentists who cooperate with [3] dental health care benefit plans. The relevant text (Par. 12) reads:

The acts, practices and methods of competition alleged in Paragraphs Nine through Eleven have had, or have the tendency or capacity to have, among others, the following effects:

A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;

B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;

C. Consumers have been or may be deprived of the benefit of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;

D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and

E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

The acts and practices described in the complaint are said to constitute both unfair methods of competition and unfair acts and practices and for both reasons to violate Section 5 of the Federal Trade Commission Act. The contemplated relief is an order for Respondent to cease and desist from the following:

1. to cease and desist from engaging in any activity that has the purpose or effect of causing or inducing dentists not to cooperate with any third-party payer;

2. to cease and desist from engaging in any activity which has the purpose or effect of causing or inducing consumers to [4] choose dentists who do not cooperate with third-party payers;

3. to cease and desist from engaging in any activity that compels or coerces any third-party payer to incorporate, delete, or modify any provision in any existing or proposed dental health care benefits program;

4. to cease and desist from all activities that have the purpose or effect of influencing the selection of dental consultants or the opinions rendered by such consultants; and

5. to notify their members and local chapters of the substantive relief provided by the order, including affirmative statements advising members that they are free to make their own decisions concerning cooperation with third-party payers.

On 10/20/78 the matter was assigned for trial to Paul R. Teetor, Administrative Law Judge, and he has since presided over all proceedings. A motion by Respondent for a more definite statement of the charges of the complaint was denied but Respondent's time to answer was extended to 12/22/78. In its Answer, Respondent admitted a few preliminary allegations of the complaint but denied all important substantive allegations and raised a number of affirmative defenses, including failure to state a claim, state action defense, no effect on

interstate commerce, non-profit association, commercial free speech, business of insurance, and complaint contrary to the public interest.

On 12/29/78 the State of Indiana moved to intervene in this proceeding to see that the so-called "state action" defense would be presented adequately. On 1/5/79, however, the Administrative Law Judge, while willing to grant *amicus curiae* status, denied the motion to intervene on the ground that the difficulties of trial would be increased without offsetting value, absent any showing that Respondent would not be able to present the "state action" defense properly.

On 1/9/79 a major prehearing conference was held in Washington at which both sides made opening statements of position, followed by arguments as to important legal questions involved. A substantial part of the conference was devoted to planning discovery, including Complaint Counsel's need for certain subpoenas and Respondent's demand for inspection and copying of Commission files and its applications for interrogatories to Complaint Counsel and [5] for third-party subpoenas. Complaint Counsel were ordered to turn all their evidence over to Respondent by 5/20/79 and Respondent to turn its evidence over to Complaint Counsel by 6/20/79. Trial was anticipated for the coming summer. Thereafter both sides worked actively and productively on discovery problems through the Spring of 1979.

At the prehearing conference of 1/9/79 Complaint Counsel's objection to searching Commission files as far back as 1961 had been overruled because the Complaint's allegations go that far back. On 2/1/79, however, Complaint Counsel gave notice of their willingness to limit their case to activities from 1970 on and Respondent accordingly agreed on 2/6/79 that the Government's file search might omit documents prepared, sent or received by the Commission prior to 1/1/70. This stipulation was approved by the Administrative Law Judge on 2/8/79.

On 2/5/79 the Commission denied a request for an appeal by the State of Indiana from the Administrative Law Judge's refusal to permit intervention as a party but confirmed that the State might have *amicus curiae* status. Unsatisfied, the State of Indiana on 5/23/79 filed a complaint (Civ. IP 79–453–C) in the U.S. District Court for Southern Indiana (Indianapolis Division) seeking an injunction against further prosecution of this matter unless and until the State of Indiana be permitted to intervene as a party or, alternatively, an injunction against further prosecution of this matter under any circumstances (because, the complaint averred, the "state action" doctrine is applicable here and operates to deprive this Commission of jurisdiction).

On 6/15/79 another prehearing conference was held in Washington, primarily to discuss the practical problems that were arising

because of a substitution of counsel for Respondent. A request by Respondent for an additional 90 days to prepare for trial was denied as unnecessary because Respondent's new counsel was its regular lawyer and quite familiar with the facts of the case. Respondent's scheduled turnover of its evidence on 7/20/79 was confirmed and trial was set for 8/6/79. By 7/17/79, however, counsel on both sides felt need for more time and trial was postponed until 9/17/79.

Meanwhile, on 7/19/79 the U.S. District Court for Southern Indiana, Holder, J., conducted a brief trial on affidavits in the State of Indiana's suit against the Commission and on 8/17/79 handed down a decision by mistake granting the State *both* of the alternative judgments it sought. The mistake was corrected almost immediately by the Court by leaving only the judgment of intervention standing but the supporting findings were never altered. [6]

In conformance with Judge Holder's intervention order[3] and in view of the need of the Indiana Attorney General's office for some time to prepare for participation in the trial, the holding of evidentiary hearings in this matter was again postponed. On 8/17/79 the Intervenor was given until 9/24/79 to turn its proposed evidence over to the other parties and trial was finally set to begin on 10/2/79 in the Federal Courthouse in Indianapolis, Indiana.

Early in the hearings (10/5/79) Complaint Counsel moved, on instructions from the Administrative Law Judge, to amend the complaint to conform to their proposed proof by including certain theories of interstate commerce not specifically referred to in the complaint, although literally covered by the words "among other things" in Paragraph 7 of the complaint. It appearing that Respondent and Intervenor had been on notice for several weeks before trial that Complaint Counsel proposed to add the evidence in question to their proof of interstate commerce, the Judge, while doubting need for the amendment, proceeded to grant it purely as a precautionary matter in open court on 10/9/79.[4]

Complaint Counsel's case-in-chief was presented by 17 witnesses, largely insurance company dentists and administrators, between 10/2/79 and 10/17/79. Respondent's defense was presented by 4 witnesses, largely Respondent's organizers and officials, on 10/30/79. Intervenor's case was presented by four witnesses, including two academic experts in dentistry, on 10/29/79 and 11/1/79. Complaint Counsel's sole rebuttal witness, an official of the Indiana Department of Insurance, was heard on 11/1/79. It was understood by all parties that if for any reason the State's status as an Intervenor were eventually disapproved, nonetheless the testimony adduced by it would re-

[3] The Commission's formal reversal of its 2/5/79 order did not occur until 10/16/79.

[4] Tr 1058.

main in the record and would be treated as if adduced by Respondent. A List of Witnesses follows. [7]

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Anderson, Carlton	28 Park Avenue Cadwell, N.J. 07006	Complaint Counsel	October 16, 1979	1976–1991
Arvanitis, Ernest A.	25–11, 147 Flushing St. Flushing, N.Y.	Complaint Counsel	October 16, 1979	1930–1949
Chichester, David I.	14 Ridge Road Enfield, Conn.	Complaint Counsel	October 3–4, 1979	387–626
Christianson, Steven	1984 Stoneyhill Drive Hudson, Ohio	Complaint Counsel	October 12, 1979	1609–1648
Clegg, Robert L., III	Indiana State Insurance Department	Complaint Counsel	November 1, 1979	2762–2784
Dixie, Gene F	1235 Mission Street San Francisco, Cal.	Complaint Counsel	October 2, 1979	250–349
Downes, William G., DDS	Newington, Conn.	Complaint Counsel	October 10, 1979	1212–1394[8]
Hurwitz, Jacob	21760 Kenosha Oak Park, Michigan	Complaint Counsel	October 15, 1979	1757–1806
Janzarik, Richard V.	716 North Wood Anderson, Indiana	Respondent	October 30, 1979	2525–2554

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Kasle, Myron J.	Indiana University School of Dentistry	Intervenor	November 1, 1979	2712–2742
Kos, John	The Equitable Life Assurance Society of the United States	Intervenor	October 29, 1979	2338–2375
MacKillop, Donald K.	63 Fox Den Road Glastonbury, Conn.	Complaint Counsel	October 15, 1979	1835–1858
Miele, Frank, Dr.	16 High Gate Court St. Charles, Ill.	Complaint Counsel	October 11, 1979	1414–1536
Mishler, Ernest	933 Briar Patch Lane Greenwood, Indiana	Complaint Counsel	October 5, 1979	908–954
Nelsen, Robert	271 East Bury Hill Rd.	Complaint Counsel	October 16, 1979	1950–1975**[9]**
Nolting, Charles	Indiana State Board of Dental Examiners	Intervenor	October 29, 1979	2197–2338
Oliver, Richard T.	Lafayette West Lafayette, Ind.	Respondent	October 31, 1979	2631–2656
Pierce, James G.	Anderson, Indiana	Respondent	October 31, 1979	2563–2619
Roberts, Fred	2910 Bodine Drive Wilmington, Delaware	Complaint Counsel	October 4–5, 1979	629–810

List of Witnesses

Witness	*Address*	*Sponsor*	*Dates/Testimony*	*Page References*
Rohn, Ralph Daniel	Alexandria, Indiana	Respondent	October 30, 1979	2381–2524
Schade, Gerhard Rudolph, Jr.	887 Goodale Hill Road Glastonbury, Conn.	Complaint Counsel	October 9, 1979	968–1171
Shafer, William	Indiana University School of Dentistry	Intervenor	November 1, 1979	2681–2708
Siegel, Henry	67 Park Terrace East New York City	Complaint Counsel	October 15, 1979	1826–1835**[10]**
Speziale, John E.	4457 Angie Way Lilburn, Georgia	Complaint Counsel	October 5, 1979	811–907
Trego, Sam	4321 Cardinal Drive Indianapolis, Ind.	Complaint Counsel	October 12, 1979	1656–1682
Winkworth, Roy	109 Chippewa Drive Alexandria, Va.	Complaint Counsel	October 11, 1979	1536–1604**[11]**

The demeanor and apparent credibility of all witnesses for both sides was generally quite impressive, with the sole exception of one of Respondent's witnesses, Dr. James Pierce, an organizer of Respondent, who consistently professed inability to remember important facts he might be expected to recall. It might further be noted that, surprisingly, Respondent's first President, Dr. David McClure, who has shared with Dr. Daniel Rohn the top leadership of virtually every Indiana effort to keep X-rays out of insurers' hands during the past decade, was never called to testify.

Approximately 440 exhibits were offered (90% by Complaint Counsel) and very generally received in evidence. This being in the nature of a conspiracy case, many of Complaint Counsel's exhibits were offered in evidence as acts and/or declarations of Respondent's co-conspirators but were challenged by Respondent and/or Intervenor as hearsay evidence and urged to be inadmissible unless and until a *prima facie* case of conspiracy be established. Such exhibits were typically admitted by the Judge only for non-hearsay use (*i.e.,* to prove the fact that a statement was made and any reasonable implication therefrom) but *not* for hearsay use (*i.e.,* to prove the truth of the statement) unless and until Complaint Counsel should establish a *prima facie* case of conspiracy which would make Respondent responsible for declarations by other members of the conspiracy made during and in furtherance of it.

In accordance with the usual practice in conspiracy cases, the Administrative Law Judge did not attempt to decide at the time of each evidentiary ruling whether or not a *prima facie* case of conspiracy had yet been made out but postponed that determination until after trial. When closing the record on 11/16/79 the Judge directed Complaint Counsel to "set out clearly in a special section of their proposed findings and conclusions the chief evidence on which they rely to establish the existence of the conspiracy alleged in the complaint." "Complaint Counsel's Brief Supporting Conclusions Of Law" contains a section entitled "Bases For Admission Of Third Party Dental Society Documents Against Respondent." (pp. 28–31 incl.)[5] Complaint Counsel rely principally on three kinds of evidence to make their *prima facie* case: [12]

(1) The testimony of Connecticut General's National Accounts Director Chichester[6] and former Indianapolis Regional Manager Roberts[7] to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the General Motors/UAW dental health plan and likewise the testimony of Aetna's Group

[5] The problem arose mostly, although not entirely, with reference to documents of IDA, which was named as a co-conspirator but not a Respondent.

[6] *See* transcript references cited in CPF 112–13, 115–16, 120–22, 175.

[7] *See* transcript references cited in CPF 87, 112–13, 115–19, 121, 125–27.

Claims Director Downes[8] and Claims Program Director Schade[9] to their personal experiences in dealing with IDA and its leaders when trying to set up and administer the International Harvester/UAW dental health plan. Their stories establish clearly the IDA-organized concert of action with regard to submission of X-rays to insurers and the important roles therein played by the future leaders of IFD.

(2) Detail about the IFD phase of the conspiracy, such as pressure put on insurers not to request X-rays and to abide by "gentlemen's agreements" developed during the IDA phase of the conspiracy, is found in the testimony of Connecticut General's former Indianapolis Regional Manager Speziale,[10] who also told of his dealings in regard to submission of X-rays with such continuing IDA/IFD leaders as Drs. McClure and Rohn.[11] Evidence that IFD was dedicated to fighting submission of dental X-rays to insurers is found in the testimony of Brockaway Glass' Personnel Manager Christianson[12] and ITT-Hoffman's Personnel Manager Trego.[13]

(3) Hearsay found in Respondent's own minutes or other declarations (whose admissibility thus does not depend on prior establishment of a *prima facie* case of conspiracy) can be used to prove IDA's prior conduct opposing X-ray [13] submission;[14] the founding of IFD as a purported "union" to evade the antitrust laws against boycotts;[15] the deferral of IDA action against submission of X-rays to give newly-founded IFD a chance to work out an arrangement with insurers;[16] exchanges of reports on IFD and IDA actions regarding the X-ray question;[17] IFD members' conduct conforming to its "Work Rule" and refusal to submit X-rays;[18] and statements in newsletters of IFD's position on the "Work Rule" and the submission of X-rays.[19]

We agree with Complaint Counsel that the evidence cited makes out a rich *prima facie* case of conspiracy. Accordingly, we now rule that all hearsay evidence received conditionally (*i.e,* dependent on proof of a *prima facie* case of conspiracy) is hereby relieved of such condition and is now received in evidence unconditionally.

Many times during the trial of this matter Respondent and Intervenor objected to "double" or "multiple" hearsay, usually in documentary evidence. Rule 805 of the Federal Rules of Evidence provides:

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[8] *See* transcript references cited in CPF 94–99, 105, 108–110.

[9] *See* transcript references cited in CPF 107–110.

[10] *See* transcript references cited in CPF 180–82.

[11] *See* transcript references cited in CPF 134–35.

[12] *See* transcript references cited in CPF 151, 176–179.

[13] *See* transcript references cited in CPF 151, 183–187.

[14] CX 505A; CX 575A-C; CX 584A-E.

[15] *See* transcript references cited in CPF 140, 193.

[16] *See* transcript references cited in CPF 145, 157; *see also* CX 194K and CX 492A.

[17] *See* transcript references cited in CPF 145.

[18] *See* transcript references cited in CPF 147–164.

[19] *See* transcript references cited in CPF 150, 153, 162.

Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

In each case when a multiple hearsay objection was raised the Administrative Law Judge assured counsel that he did not propose to rule on the admissibility of each of the many instances of multiple hearsay often found in lengthy proposed exhibits but that even if the overall document was admitted, no weight would be attached to any part violative of Rule 805. We now make it clear that we have not intentionally relied on any multiple hearsay in any exhibit, if such part violates Rule 805. Any finding based [14] in part on multiple hearsay implies that the Judge thought that particular multiple hearsay fell within an exception to the hearsay rule as contemplated by Rule 805.

It proved necessary to admit certain exhibits after the last hearing day (11/1/79) but before the closing of the record. For the record, these exhibits are as follows.

IX 500–500C: a statement of one major insurer's policy regarding "Review of X-rays", offered by Intervenor and received *in camera* by written order on 11/2/79.

CX 852, CX 853, CX 854: certified copies of certain papers filed by the Federal Trade Commission in the suit against it by the State of Indiana in the U.S. District Court for the Southern District of Indiana (Civ. No. IP 79–462–C), offered by Complaint Counsel to supplement other papers from the same file offered by Intervenor and received on 11/1/79 as IX 1000–1000 GGG. The supplementary papers were received by written order dated 11/14/79.

[It should be noted that the progress of the State's injunction suit after Judge Holder's judgment of intervention on 8/17/79 is dealt with hereafter in connection with the State's contention that certain findings by the District Judge are now binding on the Administrative Law Judge here by operation of collateral estoppel.][20]

On 11/16/79 the record of this case was closed, subject to reopening for good cause shown any time before submission of the Initial Decision. On 12/21/79 Complaint Counsel submitted "Proposed Findings And Conclusions Of Counsel Supporting The Complaint" and "Complaint Counsel's Brief Supporting Conclusion Of Law." On the same date Intervenor served "Findings Of Fact And Conclusions Of Law." Some days later, pursuant to agreement of the parties and approval by the Administrative Law Judge, Respondent served "Respondent's

[20] *See* Pars. 187 to 209, below.

Submitted Findings Of Fact And Conclusions Of Law." On or about 1/10/80 all parties served responsive papers as follows: [15]

"Respondent's Response To Complaint Counsel's Findings Of Fact And Conclusions Of Law."

State of Indiana's "Response To Complaint Counsel's Proposed Findings Of Fact And Conclusions Of Law."

"Complaint Counsel's Reply To Proposed Findings Of Fact And Conclusions Of Law Of Respondent Indiana Federation Of Dentists And Intervenor State Of Indiana."

On 2/8/80 the Administrative Law Judge sought and on 2/14/80 the Commission granted an extension of time until 3/14/80 for the filing of the Initial Decision. A further extension of time to 2/24/80 was sought on 2/13/80 and on 3/18/80 was granted by the Commission.

II. Overview

This case explores the economic impact of mushrooming dental health care insurance on the practice of dentistry. Traditionally a dentist has been relatively unfettered in his diagnosis of a patient's needs.[21] The patient might or might not be able to afford what the dentist recommended but the recommendation itself was hardly ever questioned by anybody. The phenomenal growth of group dental health care insurance in recent years[22] has changed all that. Insurers, naturally anxious to contain dental health care costs, have not generally been prepared to pay for anything that a dentist recommends.[23] Their covenants to pay dental bills have commonly been limited to payment of a reasonable charge[24] for work reasonably [16] required.[25] That imports an objective standard of necessity. As a result, someone beside the dentist must now be involved in deciding (or at least confirming) a proper treatment plan on which the payment of insurance benefits can fairly be based.

The economic interest of dentists in not being "second-guessed" by their patients' insurers is too plain to need elaboration. The experience of dental health insurers—who, of course, have their own bias—

[21] CX 139 I.

[22] CX 804Z–18 (group dental expense health insurance benefit payments up from $140 million in 1970 to $951 million in 1976); By 1978 some 48 million Americans were receiving prepaid dental care through a contract with their employers or unions (CX 584A).

[23] Tr 394–95.

[24] The language commonly used is "usual and customary" charge. (CX 47H). However, the reasonableness of the fee is *not* an issue in this case.

[25] The phrase commonly used is "least expensive yet adequate treatment" (CX 47K). The implementation of this phrase goes to the heart of the case.

has been that correcting the treatment plans submitted by dentists in Indiana almost always means slimming them down rather than beefing them up.[26] Experience shows that an alternate benefits clause is a significant cost-containing mechanism.[27]

This is not to say that any large number of dentists deliberately set out to defraud whomever is paying the bill.[28] But where a range of opinion is possible it is [17] not surprising for dentists and bill-payers to have honest disagreements of opinion as to how much dental work is really required in a particular instance. That economic conflict constitutes the background of this case.

It is worthwhile noting that this essentially economic struggle has been embittered by something equally deep-seated. The record reveals many comments by dentists reflecting the professional man's inevitable indignation at being "second-guessed". Such revealing phrases as "degrading abuse,"[29] "subjugating his own professional judgment,"[30] "dictate to the doctor"[31] and "questioned as to my professional integrity"[32] give some indication of the strong emotional component involved in the struggle here. When Respondent's leaders complain about insurers' "interference with the dentist/patient relationship,"[33] they are referring not only to the possibility of losing money but to a loss of personal pride.

The wrath of the dentists of Indiana has most frequently been vented on two practices of insurers which, the dentists assert, justify them in refusing to turn over their patients' radiographs (commonly called "X-rays") to insurers who want to see what the X-rays show. The first reason usually given for such refusal is that insurers rely too heavily on the X-rays (*i.e.*, to the exclusion of oral examinations and other diagnostic aids). A second alleged reason is that insurers reportedly use lay personnel to read X-rays (under conditions discussed later). It is reasonable and indeed should be mandatory, they claim, for dentists to refuse X-rays to people who will only abuse them. The dentists do not usually refer to another possible reason but they must be presumed to intend the natural and probable consequence of refus-

[26] An Aetna survey in its Ft. Wayne office found 20 alternative course reductions in 21 referrals. Tr 1351–52. An Aetna witness claimed this was based on bad statistics but an official investigation by the Indiana Insurance Commissioner found that only 7 percent of all alternate treatments discussed by an insurer's dental consultant with the patient's dentist resulted in an "upgrade". CX 810H. We do not accept Complaint Counsel's claim in CCPF #54 that alternate benefits clauses yield higher benefits in up to 25 percent of all cases. Even Complaint Counsel concede that "it is more usual for dentists to overtreat than to undertreat" (citing Tr 332) and that "when alternate benefits are invoked it usually means that benefits will be paid for a less expensive treatment than that proposed" (citing Tr 619, 915, 1379–80, 1507).

[27] Tr 272, 276–77, 397, 527–28, 979, 980–81, 986, 1152, 1430.

[28] A top Connecticut General dentist/executive could recall no instance of intentional or fraudulent misrepresentation which that insurer had reported to any agency in the State of Indiana. Tr 562.

[29] CX 394G.

[30] CX 47K.

[31] CX 47J.

[32] Tr 2714.

[33] This is a frequent phrase in the record here. *See e.g.*, CX 397A.

ing the X-rays to insurers: to make it harder for insurers to second-guess dentists.

Be that as it may, insurers serving Indiana have found it much harder to get dentists to give up their patients' X- [18] rays there than elsewhere.[34] This complaint was brought by the Federal Trade Commission to find out why. If dentists' refusals to turn over X-rays to insurers have been based simply on dentists' individual decisions, there is probably no antitrust offense. Contra, however, if these refusals reflect even in part the influence of a concerted refusal to deal—a group boycott—one of the most heinous offenses known to the antitrust law. *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

In summary, what is in issue here is not whether dentists or insurers are right about what treatment is needed, either generally or in particular cases, nor even whether it is fair for dentists to individually withhold from insurers the X-rays which are so important in deciding on a proper treatment plan. The issue here is, rather, whether the Indiana dentists have unlawfully organized a *collective* effort—a *group* boycott—to try and keep those X-rays out of insurers' hands.

III. Findings of Fact

A. *Respondent*

1. The sole Respondent, Indiana Federation of Dentists ("IFD"), is an unincorporated association of Indiana dentists formed on August 24, 1976.[35] Article II, Section 2 of its constitution and by-laws makes membership open to any licensed Indiana dentist who endorses IFD's purposes and those of the American Federation of Physicians and Dentists, with which it is affiliated and to which each IFD member must belong.[36]

2. The "objectives" of IFD, as set forth in Article I, Section 2 of its constitution and by-laws, are essentially "to represent the economic interests of Indiana dentists as a [19] labor organization."[37] In pertinent part Section 2 reads:

Section 2. Objectives:

The Indiana Federation shall represent, protect, maintain, and advance, through activities accomplished by relevant techniques which may lawfully be engaged in by

[34] Tr 290–92, 1471, CX 563A. The American Dental Association, for example, has never opposed submission of X-rays to insurers (Tr 306, 1003–04)

[35] CX 477C; CX 22A.

[36] CX 13C. It further provides that an IFD member must not be affiliated with any other collective bargaining agent for dentists.

[37] CX 13A-B. Also quoted in Par. 105, below.

a labor organization, the interests of the dentists within its jurisdiction. The objectives of this Federation shall include, but not be limited to the following:

a.) To represent dentists in all socio-economic matters, negotiations and grievances with employers, third, and fourth parties or any group that is involved in financing or delivery of dental care. The ultimate purpose being to promote better patient care and to prevent abuses and correct inequities in the delivery of dental care to the public;

b.) To seek to insure adequate compensation and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings;

c.) The establishment or approval of appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care;

d.) To associate together all dentists for their mutual benefit and protection;

e.) To unite the efforts of dentists in obtaining and preserving the individual freedom of action necessary for the success of their professional endeavors;

3. Although IFD is open to dentists throughout Indiana, its membership has been and is still largely concentrated in three localities of that state.[38] As of [20] June 1979 there were 46 members around Anderson (Madison County)[39] 27 members around Lafayette (Tippecanoe County)[40] and 19 members around Ft. Wayne (Allen County).[41] Obviously these are fairly small numbers in comparison with the 3,100 licensed dentists in Indiana[42] or the almost-as-large membership of the Indiana State Dental Society.[43] What IFD's members lack in numbers, however, they make up in the strength of their convictions. Immediately after issuance of this complaint each member was assessed a thousand dollars for litigation costs here (in addition to usual dues of two hundred dollars per year).[44]

4. Respondent has argued that the Commission has no jurisdiction over this unincorporated association because it is not organized to carry on business for its own profit.[45] However, the merest consideration of its objectives[46] makes it clear that IFD is not a charitable organization but is organized to carry on business in substantial part *for the profit of its members.* Accordingly, it falls within the definition of "corporation" as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44 (1976).

5. Numerous cases support this Commission's jurisdiction over purportedly non-profit organizations such as trade associations which,

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[38] *See* RPF 2, IPF 116, 117.

[39] CX 811A (including 100 percent of all dental specialists in the area).

[40] CX 811B (including 67 percent of all dental specialists in the area).

[41] Statistics on specialists are not available for Ft. Wayne because this Chapter was not formed until 1978 (CX 566A-B).

[42] Tr 2261.

[43] The IDA mailing list is said to miss only 12–15% of all Indiana dentists (CX 303E).

[44] CX 12.

[45] Respondent's Answer to Complaint, Par. 17.

[46] *See* "objectives" set forth in Par. 2, above. Note also that IFD's application to the Internal Revenue Service for recognition of a federal income tax exemption was based on a claim that IFD is a labor organization rather than that it was a charitable association. CX 33A-B.

however, promote the economic interests of their members. *FTC* v. *Cement Institute,* 333 [21] U.S. 683, 690 (1948); *Fashion Originators' Guild of America* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *National Commission on Egg Nutrition,* 88 F.T.C. 89, 175–177 (1976), *aff'd.,* 570 F.2d 157 (7th Cir., 1977), *cert. den.,* 439 U.S. 821 (1978); *FTC* v. *National Commission on Egg Nutrition,* 517 F.2d 485, 487–88 (7th Cir., 1975), *cert. den.,* 426 U.S. 919 (1976); *Chamber of Commerce* v. *FTC,* 13 F.2d 673, 684 (8th Cir., 1926); *National Harness Mfgrs. Assn.* v. *FTC,* 268 F. 705, 708–09 (6th Cir., 1920). Only one non-charitable purpose is necessary to give the Commission jurisdiction. *American Medical Association,* FTC Docket No. 9064, slip opinion of Commission issued 10/12/79, at page 5, fn.5 [94 F.T.C. 701 at 984].

6. Respondent IFD is not and never has been a labor union within the meaning of Section 6 and 20 of the Clayton Act (15 U.S.C. 17 and 29 U.S.C. 52) which exempt genuine labor unions from the provisions of the federal antitrust laws. Similar associations of independent businessmen, including private practice physicians, organized for the purpose of dealing with powerful customers have been held not entitled to the benefit of the Clayton Act exemption. *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143 (1942); *American Medical Assn.* v. *United States,* 317 U.S. 519 (1943). Evidences of efforts to dress IFD up as a labor union thus have no significance here except as they may tend to show guilty consciousness by IFD's founders that their activities would probably be unlawful under the Federal antitrust laws.[47]

7. Respondent IFD is obviously not engaged in the business of insurance—however defined—within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012, 1013(b), which makes the Federal antitrust laws inapplicable to the insurance business, except insofar as it is not regulated by State law. The insurers to whom Respondent's members have allegedly refused X-rays (thereby restraining their trade) are technically not engaged in the business of insurance either, because the Supreme Court has recently called risk-spreading and underwriting the essential elements of "insurance", *Group Life & Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205, 211 (1979) whereas the "insurers" involved here typically operate on a cost-plus basis, passing the risk back to the group covered (*e.g.,* all General Motors employees).[48] Even, however, if the kind of claims servicing functions performed by the "insurers" here be treated as "insurance" within the meaning of the McCarran-Ferguson Act, that Act expressly pro-

[47] *See* Par. 94, below.

[48] Under the Connecticut General/General Motors Plan the premium equals anticipated benefit payments during the coming year plus administration expense, share of overhead and profit (Tr 507–08). Under the Aetna/International Harvester Plan, Harvester transfers funds to Aetna to take care of claims up to a certain limit beyond which Aetna assumes the risk. "Premium" is defined in this contract to mean the sum of Aetna's administrative costs plus anticipated claims (Tr 1079–80).

vides that [22] nothing in it shall render the Federal antitrust laws inapplicable to any "agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. 1013(b). Thus the same proof of participation in an organized boycott which would tend to establish a boycott in violation of the antitrust laws would at the same time lift the prohibition of the McCarran-Ferguson Act against action by this Commission to end such a boycott.

B. *Interstate Commerce*

9. Under the Magnuson-Moss Warranty-FTC Improvement Act of 1975 [Title II, Sec. 201(a)] amending 15 U.S.C. 45, unfair methods of competition and unfair trade practices are within the jurisdiction of the Commission if they are in or affect interstate commerce. The practice of dentistry in Indiana is obviously *not* in interstate commerce. However, much if not most of the business of dental health care insurance carried on in Indiana *is* in interstate commerce under the tests laid down in *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533 (1944). The boycott alleged in the complaint is by its very nature designed to affect such interstate commerce in insurance adversely by depriving insurers of the X-rays they need in order to determine the least costly adequate treatment for their insureds.

10. The necessary effect on commerce must be substantial and "it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce." *McLain* v. *Real Estate Board of New Orleans,* 444 U.S. 232 (1980) (Docket No. 78–1501, slip opinion of 1/8/80, page 9). However, Federal jurisdiction for purposes of injunctive relief is not defeated by Complaint Counsel's "failure to quantify the adverse effect of respondent's conduct" or even by "inability to prove that concerted activity has resulted in (any) legally cognizable damages." *Ibid.,* page 10. The correct formula, as laid down [23] by the Supreme Court in *McLain* is that:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' . . . activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy . . . or by those other aspects of respondents' activity that are alleged to be unlawful. *Ibid.,* page 9.

11. In this case, while Complaint Counsel do not attempt to quantify the extent to which Respondent IFD's boycott campaign has in fact affected commerce in interstate insurance, the record is replete with evidence of the magnitude of business done by interstate insurers in Indiana under dental health insurance contracts with predetermina-

tion and alternate benefits provisions. For this purpose we adopt and attach hereto as Figure 1, a tabulation prepared by Complaint Counsel[49] from evidence specified in detail in Complaint Counsel's Proposed Findings of Fact #39 through #44, now incorporated herein by reference. Figure 1 shows that during 1976 and 1977 more than a half dozen well-known interstate insurers made benefit payments of almost $13 million into Indiana under dental plans with predetermination and alternate benefits features. An organized boycott attacking interstate business of this magnitude is a "substantial" restraint on such trade, whether or not the boycott ever succeeds.[50] **[24]**

[49] CCPF, page 20.

[50] "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." *Ibid*, pages 9–10. *See also Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785 (1975): "The fact that there was no showing that . . . buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise the magnitude of the effect would control and our cases have shown that once an effect is shown, no specific magnitude need to be proved." [Citing *United States* v. *McKesson & Robins*, 351 U.S. 305, 310 (1956).]

Figure 1

45. Tabulation Of 1976-77 Data Contained In CPFs 39-44

Interstate Payments Into Indiana Under Dental Plans With Predetermination And Alternate Benefits Features	Indiana		Anderson Area		Lafayette Area		Ft. Wayne Area	
	1976 */	1977 */	1976	1977	1976	1977	1976 */	1977 */
Aetna	$1,875,000	$2,250,000					$1,151,995	$1,453,751
CG	9,322,800	9,707,000	$2,141,100	$2,600,100				
Metropolitan	284,000	339,000						
Travelers	489,522 **/	2,365,887			$3,694 **/	$77,816		
Prudential	440,000	1,178,000						
Equitable	456,750	375,600						
Other Relevant Interstate Dental Benefit Payments								
Peter Paul Inc. (Frankfort, Ind.)					$3,870	$18,864		
Johns-Manville (Alexandria, Ind.)			$11,476	***/				
Totals	$12,868,072	$16,215,487	$2,152,576	$2,600,100	$7,564	$96,680	$1,151,995	$1,453,751

*/ Policy and calendar years, whichever the company uses to compute data.

**/ Statistics were available for only July - December of 1976 (see CPFs 39, 43).

***/ Data for 1977 unavailable. The amount for 1978 was $8,986 (see CPF 44).

[25] C. *The IDA Boycott*

12. The Supreme Court recently defined a "boycott" this way:

> The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold patronage or services from the target. *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531, 541 (1978).

Unlike some legal definitions, this one conforms closely to the common understanding of the same word.[51] Our immediate task is to determine whether the record here fairly establishes a boycott and, if so, what if any role Respondent has played in organizing it and/or keeping it going.

13. The allegation of the complaint in Pars. 9–10 is that Respondent Indiana Federation of Dentists, when formed in late August 1976, simply took over a going conspiracy organized by IDA to keep dental X-rays out of insurers hands. When dawning consciousness of illegality led IDA to give up the fight, IFD was organized as a "labor union" by the old leaders to continue the same boycott in a new guise, Paragraph 11 of the complaint charges. A mass of evidence supports this allegation.

14. Indiana Dental Association (IDA) is a "constituent society" of the American Dental Association.[52] Its membership in 1974 encompassed about 85 to 88 percent[53] of the state's 3,100 licensed dentists.[54] Its members automatically belong to 14 affiliated "component" (*i.e.,* local) dental societies,[55] which elect representatives to [26] the state association's governing body, known as the House of Delegates.[56] IDA's top executives including a President, Secretary and Board of Trustees, are elected statewide annually.[57]

15. Sometime before 1970, in response to the appearance of industrial and other group dental insurance plans, IDA had set up a Council On Dental Care Programs (CDCP) composed of representatives from each of the 14 local societies.[58] It was its duty, among other things, to "formulate Association policies, standards and principles for evaluating group-funded dental care programs (public and private) subject to approval of the House of Delegates."[59] The three areas (Anderson, Lafayette and Ft. Wayne) where anti-insurer sentiment was strongest

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[51] "To combine against a landlord, tradesman, employer or other person, to withhold social or business intercourse from him and to deter others from holding such intercourse." Webster's New International Dictionary, *vide* "boycott".

[52] CX 798E; CX 799E.

[53] CX 303E.

[54] Tr 2261.

[55] CX 3B, CX 4B, CX 5B, CX 6B, CX 7C, CX 8B, CX 9B, CX 10B, CX 11B.

[56] CX 798G; CX 799G

[57] CX 798L; CX 799 I.

[58] CX 3D; CX 72C; CX 99D; CX 433.

[59] CX 798Q; CX 799M.

and which would eventually give birth to the three chapters of IFD were always well-represented on CDCP. Future officials of IFD who sat on IDA's Council On Dental Care Programs during the 70's are shown in Figure 2. [27]

Figure 2

Future IFD Officials Who Served On IDA Council On Dental Care Programs

			Evidentiary References	
Year	Name	Area	IFD Membership	CDC Positions
1970–71	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 3D
	Dr. Richard Harrison	Anderson	CX 18A	CX 3D
1971–72	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 4D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 4D
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 4D
1972–73	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 6D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 6E
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 6D
1974–75	Dr. Robert Gayle	Ft. Wayne	CX 21	CX 7D
	Dr. Richard Oliver	Lafayette	CX 20B	CX 7E
	Dr. Dan Rohn	Anderson	CX 18B	CX 7D
	Dr. Paul Van Dorn	Anderson	CX 18B	CX 7D
1975–76	Dr. Richard Fontaine	Lafayette	CX 19A	CX 8E
	Dr. Karl Gossweiler	Anderson	CX 18A	CX 8D
	Dr. Dan Rohn	Anderson	CX 18B	CX 8D
	Dr. David Steele	Anderson	CX 18B	CX 8D
1976–77	Dr. Richard Fontaine	Lafayette	CX 19A, 20A	CX 9D
	Dr. David McClure	Anderson	CX 18A	CX 9D
	Dr. Dan Rohn	Anderson	CX 18B	CX 9D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 9D
	Dr. David Steele	Anderson	CX 18B	CX 9D
1977–78	Dr. David McClure	Anderson	CX 18A	CX 10D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 10D
	Dr. David Steele	Anderson	CX 18B	CX 10D
1978–79	Dr. David McClure	Anderson	CX 18A	CX 11D
	Dr. Charles Sabel	Lafayette	CX 19A, 20B	CX 11D
	Dr. David Steele	Anderson	CX 18B	CX 11D [28]

Attention should be called to the prominent roles played in the Council during much of the '70's—even after the formation of IFD—by Dr. Dan Rohn (Vice Chairman and then Chairman, 1974–1977) and Dr. David McClure (Consultant at Large, 1976–1979), the two principal figures in IFD.

16. These roles have been in *addition* to other significant positions in IDA held by these future IFD officials, all as shown in CX 2A-E. Dr. Rohn, for example, was President of the Indiana Dental Association for 1972–73 and Dr. McClure was Secretary of the Indiana Dental Association from 1970 until 1976 (the year that IFD was formed with McClure as President and Rohn as Vice President). Drs. Rohn, McClure and Oliver, along with Dr. James Frey of the Ft. Wayne area, another future IFD official, made up half of a special six-dentist "task force" on Dental Care Programs set up to supplement the work of CDCP during the critical 1976–77 period.[60] Dr. Rohn chaired *both* the Council and the task force.[61]

17. IDA's attitudes and policies toward dental health insurance plans have long been embodied in an official "Manual On Group Funded Dental Care Programs."[62] It first appeared in January 1968; a second edition was published in November 1969; and revisions were made thereafter in May 1972, May 1974 and May 1976.[63] The "Manual" is one of the most important pieces of evidence here because it lays out so clearly and completely the IDA policies on which the boycott was based. It begins with an introduction by CDCP:

> The purpose of this manual is to *give Indiana Dentists and their assisting staff an appropriate and useful guide to follow when providing dental care to patients having a group funded dental care plan* (public or private). By making this information readily available to Indiana dentists, *the Association policies and standing rules regarding group funded programs will be more* [29] *meaningful; followed more uniformly;* and result in better services to patients and dentists alike. (emphasis added)[64]

18. Part II of the "Manual" ("Policy and Information") covers "I.D.A. Policy Regarding Group Dental Care," reciting adoption by I.D.A.'s House of Delegates on 5/22/62 and amendments by the same authority dated 1965, 1966 and 1972.[65] [The last revision in this record (1976) also recites amendments adopted in 1970, 1973, 1974 and 1975.][66] It begins with a section on "I.D.A. Policy Regarding Group Dental Care," subtitled "Principles for Determining the Acceptability

[60] CX 106, CX 490B.
[61] CX 106.
[62] CX 47, CX 72, CX 99.
[63] CX 47A, CX 72A and CX 99B. This record contains no later editions or revisions.
[64] CX 47C.
[65] CX 47E.
[66] CX 99F.

of Plans for the Group Purchase of Dental Care" (more commonly called "the Principals of Acceptability").[67] These "principles" cover a number of matters such as IDA participation (but without contractual commitment) in the development of such plans; maintenance of a high standard of dental treatment and compliance with IDA's Code of Ethics; freedom of patients to choose their dentists and vice versa; eligibility of all licensed dentists to participate, etc.[68]

19. Of particular importance here is Principle Number 6, which reads as follows:

> 6. The areas of responsibility involved in the administration of the plan must be recognized and properly evaluated.
>
> a. The administration of the professional phases of the plan should be entirely within the control of professional personnel. Professional standards and treatment should not be controlled by non-dental administrators.
>
> b. The method of authorization of dental health care under pre-payment plans should be limited to determining the eligibility of the patient and **[30]** extent of liability of the plan and should prevent any interference with the dentist-patient relationship or with the judgment and decision of the dentist. The plan must not *require* the dentist to submit[69] radiographs (X-rays) to a third party. (emphasis in original)
>
> c. The submission of a total estimate is acceptable, *if requested by the patient.* (emphasis in original)[70]

20. Note well that while Principle Number 6 is clearly opposed to insurance contracts which compel production of a dentist's X-rays at the request of the insurer, this Principle does *not* take the next step: directing dentists to refuse to submit X-rays to third parties on request. However, a subsequent part of the "Manual" contains a form letter to be sent by dentists on I.D.A. stationary "To All My Patients," which does, indeed, take the next step. Paragraph Number 5 reads:

> Dental radiographs (X-rays) are a part of the dentist's legal health records. They are available for valid review by a qualified representative(s) of your insurance company in this office. *Radiographs (X-rays) will not be submitted to third parties for their use in determination of benefits* (*e.g.*, least expensive adequate procedure or optional course of treatment) because a determination of an adequate treatment plan can only be made after a knowledge of the following:
>
> A. Complete patient evaluation
> B. Radiographs
> C. Additional diagnostic procedures as required. (emphasis added)[71] **[31]**

21. Paragraph 5 of the form letter "To All My Patients" plainly directs Indiana dentists not to send X-rays to insurers for the only purpose insurers would want them: to determine insurance benefits.

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[67] CX 47E.
[68] CX 47E.
[69] Later revisions inserted here "either pre or post operative." *See* CX 99F.
[70] CX 47E.
[71] CX 47G. *See also* CX 72F and CX 99 I (same wording in later revisions of Manual).

It can be argued—that the provision permitting "qualified" insurance personnel to come to the dentist's office to study X-rays prevents the passage in question from amounting to a total blockage of access to the X-rays.[72] However, there is unchallenged testimony in this record to the effect that it is not economically feasible and in any event it would be a terrible waste of time to have insurers' professional dental consultants constantly travelling from office to office to talk to dentists (when available) and look at their X-rays.[73] As a practical matter, we find that Paragraph 5 of the Manual amounts to a plan by IDA for Indiana dentists to boycott insurers. Whether the boycott could be justified, as attempted in the suggested Paragraph 5, on a theory that working from X-rays alone without "complete patient evaluation" and "additional diagnostic procedures" is inadequate for proper determination of a treatment plan is, of course, a separate question, reserved for consideration hereafter.[74]

22. A subsequent section of the Manual is entitled "Uniform Method For Processing Group Funded Dental Care Plans,"[75] and goes into great detail on how a dentist should deal with his patients (including giving them copies of the "To All My Patients" letter described above). Under "Points to Discuss with Patients" occurs this enlightening advice from IDA to its dentist members:

1. Pre-authorization or predetermination is required by some group-funded dental care programs.[76] The dentist [32] will cooperate with this procedure by providing the patient with a treatment plan on the Uniform Report Form if—

a. The plan does not interfere with the dentist's professional judgment (*i.e.,* attempt to dictate to the doctor and his patient what and/or how the service should be performed).

b. It is *limited* to determining the extent of liability of the plan.

c. It does *not* require the submission of preoperative radiographs.

2. Some insurance plans provide for "alternate benefits". Usually, the wording for this in a plan is, "*. . . the least expensive yet adequate treatment.*" If this is the case, be sure the patient understands that the treatment plan the dentist has proposed may not be accepted by the insurance company. Instead, the company may pay for a *less expensive or optional* course of treatment which the third party determines to be adequate. In this event the dentist and patient have two options:

a. Continue with the original treatment plan with the patient understanding that he will be reimbursed for only part of the cost of treatment.

b. If the patient elects the alternate treatment as determined by the insurance company, the dentist should consider the fact that in proceeding with a treatment plan prescribed by a third party, he (the Dentist) is put in the [33] position of justifying, both

[72] The same invitation to check X-rays in the attending dentist's office appears in a "sample letter to (insurance) carrier if carrier requests X-rays. . . ." CX 47X; CX 72O; CX 99V.

[73] Tr 341–42, 924–25, 978, 1221, 1232, 1383–84, 1457; CX 303E; CX 316.

[74] *See* Pars. 120–148 below (re reasonableness of the restraint).

[75] CX 47I *et seq.;* CX 72H *et seq.;* CX 99K *et seq.*

[76] The testimony here was that predetermination is usually required for work expected to cost over $100, although inflation has recently been driving that figure up to $125. (Tr 393, 535–536, 980)

morally and legally, the results of this plan, which is not of his own making. And moreover, in subjugating his own professional judgment to a third party, he is negating his claim to a professional status and, in fact, has become merely a mechanic carrying out a treatment plan designed by someone who has never seen his patient and whose qualifications are unknown. Thirdly, by accepting such third party diagnosis, the dentist will be setting a dangerous precedent which could have far reaching implications, affecting the professionalism of dentistry."[77] (emphasis in original)

23. The strong *feeling* evident in this passage provides revealing background for the *action* called for by the next part of the Manual. This instruction is found in an "Attending Dentist's Statement" to be given by a patient to an insurer as a claim form.[78] The front and rear are shown here as Figures 3A and 3B respectively: [34]

[77] CX 47J-K.

[78] CX 47L-M; CX 72I-J; CX 99M-N.

FIGURE 1-A

ATTENDING DENTIST'S STATEMENT

ADA 1971

CX ID-47-L

CHECK ONE: ☐ DENTIST'S PRE-TREATMENT ESTIMATE
☐ DENTIST'S STATEMENT OF ACTUAL SERVICES

Spaced for Typewriter - Marks for Tabulator Appear on this Line

1. EMPLOYEE NAME | 2. SOCIAL SECURITY NUMBER

3. ADDRESS | CITY | STATE OR PROVINCE | ZIP

4. PATIENT NAME (IF A DEPENDENT) | 5. RELATIONSHIP TO EMPLOYEE | 6. BIRTH DATE MO. DA. YR. | 7. DATE FIRST VISIT (CURRENT SERIES)

8. EMPLOYER NAME | 9. DOES PATIENT HAVE OTHER HEALTH COVERAGE? YES ☐ NO ☐ IF "YES" PLEASE IDENTIFY.

10. GROUP DENTAL PLAN NAME | 11. POLICY NUMBER | 12. UNION LOCAL NO.

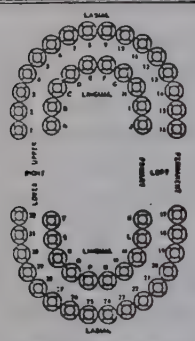
13. DENTIST'S NAME (PRINT) | 14. LICENSE NO. | 15. INDIVIDUAL PRACTITIONERS - SSN; ALL OTHERS - EMPLOYER I. D. #

16. ADDRESS | CITY | STATE OR PROVINCE | ZIP

MUST BE FURNISHED UNDER AUTHORITY OF LAW

17. IS ANY OF THE TREATMENT FOR: (a) ORTHODONTIC PURPOSES? YES ☐ NO ☐ | (b) ACCIDENTAL INJURY? YES ☐ NO ☐ | (c) OCCUPATIONAL INJURY? YES ☐ NO ☐

18. IF PROSTHESIS, IS THIS INITIAL PLACEMENT? YES ☐ NO ☐ IF NO, REASON FOR REPLACEMENT? | 19. DATE OF PRIOR PLACEMENT: MO. DA. YR. | 20. ARE X-RAYS ENCLOSED? YES ☐ NO ☐ IF YES, HOW MANY?



INDICATE MISSING TEETH WITH AN "X"

REMARKS FOR UNUSUAL SERVICES

EXAMINATION AND TREATMENT RECORD - USE CHARTING SYSTEM SHOWN

TOOTH # OR LETTER	SURFACES	DESCRIPTION OF SERVICE (INCLUDING X-RAYS, PROPHYLAXIS MATERIALS USED, ETC.)	DATE SERVICE PERFORMED MO.	DA.	YR.	ADA PROCEDURE NUMBER	FEE	FOR CARRIER USE ONLY
		Initial Oral Examination	6	4	72	00110		
		Intra-Oral Complete Series	6	4	72	00210		
13	1	Amalgam-one surface-permanent	6	4	72	02140		

SAMPLE

ORTHODONTICS: (give diagnosis, class of malocclusion and describe appliance(s) in above treatment section)
DATE FIRST APPLIANCE INSERTED
DATE LAST APPLIANCE REMOVED
TREATMENT PERIOD (NUMBER MONTHS)
TOTAL FEE $

TOTAL FEE ACTUALLY CHARGED	
PATIENT PAYS	
BALANCE	
CARRIER %	
CARRIER PAYS	

I HAVE REVIEWED THE FOREGOING TREATMENT PLAN. I AUTHORIZE RELEASE OF ANY INFORMATION RELATING TO THIS CLAIM.

SIGNED (PATIENT, OR PARENT IF MINOR) DATE

I HEREBY CERTIFY THAT THE SERVICES LISTED ABOVE WILL BE ☐ HAVE BEEN ☐ PERFORMED

SIGNED (DENTIST) DATE

I HEREBY AUTHORIZE PAYMENT DIRECTLY TO THE ABOVE-NAMED DENTIST OF THE GROUP INSURANCE BENEFITS OTHERWISE PAYABLE TO ME, BUT NOT TO EXCEED THE CHARGES SHOWN. I UNDERSTAND THAT I AM FINANCIALLY RESPONSIBLE FOR ANY CHARGES NOT COVERED BY THIS AUTHORIZATION.

SIGNED (INSURED PERSON) DATE

Form Approved by the Council on Dental Care Programs of the A. D. A., June, 1971
Form Approved by the Council on Dental Care Programs of the I. D. A., August, 1971

Figure 3-B

YOUR DENTIST wishes to cooperate with you as his patient in order that you may learn the extent of your dental care insurance coverage and how much will be paid to you.

In order to avoid any misunderstanding, we urge you to read the following information:

1. Our professional services are rendered on the basis that all costs of treatment will be paid by the patient.

2. In some plans, the dental insurance contract is written to provide for the least expensive, adequate procedure as determined by the insurance company. The carrier will request x-rays to make this determination. If your contract is written in these terms, please give special attention to the following:

   A. The Indiana Dental Association does not agree with such a contract.

   B. Trying to determine if a treatment plan is adequate based on x-rays alone is impossible without an in-office examination of the patient.

   C. X-RAYS WILL NOT BE SUBMITTED TO A THIRD PARTY FOR THIS PURPOSE.

   D. Your dental insurance contract is an agreement between you and/or your employer and their insurance carrier. Indiana dentists are not bound by any dental care insurance contract stipulation.

[36] 24. Figure 3–A is a critically important piece of evidence. It dispels any impression that IDA is merely expressing an academic disagreement or an academic belief. Paragraph 2–C of Figure 3–A is an action sentence. When it says, in standout type, that *"X-rays will not be submitted to a third party for this purpose,"* (emphasis added) ADA is now telling its dentists to tell their patients that this is the way it is going to be. As in Paragraph 5 of the "To All My Patients" form letter,[79] *IDA here again makes it clear that Indiana dentists are expected by ADA to join in a boycott of the insurers serving that state.*

25. Not only were these identical words still on the back of IDA's claim form in the latest record revision of IDA's "Manual" in 1976 (the year that IFD was founded),[80] but the rule had actually been tightened up in important respects.[81] Significantly, the 1976 revision of the "Manual" was systematically distributed to *all* members of the Indiana Dental Association by order of Dr. David McClure for IDA's Council on Dental Care Programs[82] during the same time that he was organizing and becoming the first President of the Indiana Federation of Dentists.

26. It is now well established that an organization of professionals whose members accept and follow anticompetitive organizational policy declarations may be found to have conspired with its members to that end. *United States* v. *National Society of Professional Engineers,* 389 F. Supp. 1193, 1201, 1216 (D.D.C., 1974), *vacated,* 422 U.S. 1031 (1975), *affd. on remand,* 404 F. Supp. 457 (D.D.C., 1975), *affd. and modified,* 555 F.2d 978 (D.C. Cir., 1977), *affd.,* 435 U.S. 679 (1978); *United States* v. *Texas State Board of Public Accountancy,* 464 F. Supp. 400, 403 (W.D. Tex., 1978), *affd. per curiam as modified,* 592 F.2d 919 (5th Cir., 1979), *cert. denied,* 48 U.S.L.W. 3283 (10/29/79); *American Medical Assn.,* FTC Docket #9064, slip opinion of 10/ [37] 12/79 at p. 21 [94 F.T.C. 701 at 998]; *appeal docketed,* Civ. No. 79–4214 (2d Cir., 12/3/79). Here there is abundant evidence that IDA's boycott policy was, in fact, accepted and followed by many if not most of its members. We now review that evidence.

D. *The Pledge Project (1973)*

27. Perhaps the most striking evidence of the backing which the membership of IDA has given such leaders as Drs. McClure and Rohn is found in a so-called "pledge project" which these two dentists co-

[79] *See* Pars. 20–21 above.

[80] CX 99N.

[81] In May 1976 IDA added to the form its opposition to the whole alternate treatment concept (CX 99G); affirmed that an insurer's inspector must be a duly Indiana licensed dentist (CX 99W); and insisted that an insurer must pay the treating dentist a "consultation fee" (CX 99W).

[82] Tr 2500–01; CX 104.

chaired in early 1973.[83] The pledge card itself is reproduced here as Figure 4.[84] [38]

Figure 4

Name _____
Address _____
Component _____
I.D.A. Member Yes _____ No _____
The above mentioned dentist was contacted on _____ by
Dr. _____.
His reason for not signing the pledge card is as follows:

_____
_____
_____
_____

PLEDGE

As a member of the dental profession licensed to practice in the state of Indiana, I am obligated from a professional and legal point of view to provide my patients the best dental care I can deliver. This care is based on a mutual understanding between the patient and the dentist.

Certain group-funded dental plans can interfere with the principle of maintaining a high standard of dental treatment. Therefore, I will participate in all plans within the framework of the Principles of Acceptability approved by the Indiana Dental Association.

_____
(Signature)

_____
(Date)

[39] 27.1 In an invitation to certain dentists to attend a project orientation meeting and "leadership training session" the project was explained this way:

As you know, there is significant rapid growth of group-funded dental care programs in Indiana. *The I.D.A. has prepared to meet this challenge through the development and implementation of the "Indiana Plan". We know it will work because it has worked successfully for many on-going programs in Indiana.* True, there is a major program that is giving us trouble (Aetna-International Harvester-U.A.W.)[85] and this must be resolved.

[83] CX 124 and CX 125.
[84] CX 126C.
[85] Highlights of the Aetna-Harvester-U.A.W. struggle with I.D.A. are summarized in Par. 40 *et seq.*, below.

* * * * * * *

With the advent of many more programs—particularly the pending U.A.W. Auto Contract[86]—we must make sure the "Indiana Plan" continues to work and work well, or we stand the chance of being dictated to by some distant third party. With this in mind, the I.D.A. Board of Trustees has approved a statewide "Indiana Plan" pledge project program.

* * * * * * *

What we are asking is that you be one of our key representatives to take the pledge project to the (local) component societies; give them the "pitch"; and bring home the pledges. *Once this has been accomplished we can say, with proof, to any third party that Indiana dentists actively support the "Indiana Plan".* (emphasis added)[87] **[40]**

28. Attendees at the "pledge project" orientation meeting were each given a "training kit" containing various materials for canvassers to study in preparation for making their "pitch".[88] A list of "ideas for presentation" included a reaffirmation of IDA's position that "there are many factors that guide a dentist in his determination of a treatment plan" and that "proper dental treatment is predicated on a diagnosis from many types of examination and *not radiographs alone"* (emphasis added).[89] It warned that "if dentists allow third-party [insurer] intervention, we will soon find ourselves technicians rendering a service sold, priced and controlled entirely by a third party."[90] The "pitch" of most importance here was a final appeal for collective action:

The road ahead *depends upon the unity* that will be generated among Indiana dentists. It is time to close our ranks and look to the future. *Unity = Negotiating Power.*[91]

29. The same occasion brought forth numerous other references to the need for professional solidarity in dealing with the insurers:

Dr. Lloyd Phillips (IDA's Trustee in the American Dental Association)

We have assumed that Indiana's position was and is one of strength because the members of the Indiana Dental Association believed in the "Indiana Plan" and supported it with action. *We are here today to organize an evangelistic brigade to go out and preach the gospel;* to explain the principles; give the reasons why they should be supported; and then ask each member to indicate his support and his belief by signing

[86] Apparently refers to the Connecticut General - General Motors - U.A.W. contract which was to become effective the following year (1974). *See* Par. 53 *et seq.*, below.

[87] CX 125.

[88] CX 139A through CX 139–Z4.

[89] CX 139M.

[90] CX 139M.

[91] CX 139M.

a pledge. (emphasis added)[92] [41]

Dr. David McClure (Secretary of IDA)

Two weeks ago G.M. sent their top negotiator to Anderson to meet with Dr. Van Dorn and me. . . . They are very aware of us and would never have sent this type brass down if they weren't concerned. *It boils down to their respect for our unity and I do feel that we can influence our future.*[93]

* * * * * * *

A few weeks ago we met with officials from Equitable Life Assurance Society. . . . Here again *they respect unity.* (emphasis added)[94]

Dr. Dan Rohn (President-Elect of IDA)

In order to make a profit and be competitive, the (insurance) carrier must have some kind of cost control. The union doesn't want the traditional methods of cost control such as a table of allowances, a deductible plan, or any limitation on benefits. The (insurance) carrier then must control costs by controlling the dentist. A fee schedule is one way of doing this. Another is the most recent "gimmick"—a clause which states the least expensive adequate treatment *as determined by the carrier!* (emphasis in original)

What this really means is that the insurance company reserves the right to review the dentist's treatment plan, examine his X-rays, make a diagnosis of oral disease, and alter the treatment plan as they see fit to suit their economic considerations. We know this has been done by untrained, unqualified and unlicensed people. [42]

We know this has happened in the past; we know this is happening now; and we know it will continue to happen in the future unless *we assert ourselves.* (emphasis in original)

Just how do we think we can interject ourselves in these negotiations and effect (sic) the way a contract will be written? By showing *unquestionable solidarity!* (emphasis in original) *By obtaining a pledge from every practicing dentist in the State of Indiana stating that he will not provide his professional services with any group funded plan whose procedures and requirements do not meet the standards of the Indiana Dental Association.* (emphasis added)

If we can get a majority of the practicing dentists in the state to give us this pledge, we can assert ourselves as a fourth interested party. (emphasis added)

We can advise local labor and management groups of how much solid support we have for our principles. (emphasis added) They have already told us they will listen. . . . *They know that they cannot receive any dental benefits unless we are willing to service their agreement.* (emphasis added) To obtain these pledges *we must have your cooperation.* (emphasis added) We want to face every dentist in the state; explain our position as we have done here today; and ask him to sign a pledge to show support for these principles.[95]

30. The IDA party line during these years—with one eye on the

[92] CX 139C.
[93] CX 139G.
[94] CX 139H.
[95] CX 139J-K.

Justice Department and a possible charge of restraint of trade—seems to have been that IDA merely determines whether an insurer's plan "does not appear to be in the best interests of the doctor-patient relationship" and informs "the general membership" of "the general picture," leaving it to the dentists to "react as individuals".[96] However, the foregoing passages clearly [43] evidence a plan to mobilize Indiana's dentists into an "evangelistic brigade": brandishing a *collective,* not an *individual* refusal to deal with the insurers serving the state.[97]

31. IDA's well-organized "pledge project" to enlist added support for the work of IDA's Council On Dental Care Programs was, in fact, a "tremendous success", with several of the association's fourteen local component societies actually achieving 100 percent support for the IDA Principles of Acceptability.[98] Dr. Robert Gayle of Ft. Wayne, for example, reported to Co-Chairman Rohn that he had addressed 26 of the 48 members in the Richmond area, all of whom signed a pledge card and agreed to assist in getting the other men that were absent to sign a pledge card.[99] He further reported:

> I felt as though the subject was well received and from the comments made, the concept of unity would be worked for in that area. (emphasis added)[100]

Overall, CDCP's Chairman reported, more than 85 percent of IDA's membership responded that they would support the Principles of Acceptability.[101]

32. In IDA's house organ Co-Chairman Rohn, by then President-Elect of IDA, wrote:

> In the past year, as we have met with insurance carriers and different management representatives, they would often reply that we didn't speak for the IDA membership at large. So the pledge project was concerned with the idea that we must know if we are on the right track when advocating policy that the dentists of Indiana through their House of Delegates have approved. [44]
>
> * * * * * * *
>
> What does this overwhelming success mean? It means that we have *unity* (emphasis added) and your leadership can go to insurance carriers, unions and management with these pledge cards in our pocket. We can inform them that the dentists of Indiana do support their Association's Principles of Acceptability. Any contract that is written

[96] CX 74A.
[97] CX 138.
[98] CX 138.
[99] CX 133.
[100] CX 133.
[101] CX 74A.

without taking this into consideration will have problems in Indiana.[102]

It would be hard to imagine a more clear-cut acceptance of IDA's proposed concert of action. The only remaining question is whether the IDA boycott *proposed* by its leaders and *accepted* by "a vast majority"[103] of its members was, in fact, *followed.*

E. *The Post Card Survey (1975)*

33. Two years after the Pledge Project, IDA's Board of Trustees reaffirmed support for the IDA Principles of Acceptability[104] and had the IDA central office conduct an official survey by mail of the membership's thoughts and actions on X-rays and dental insurance programs.[105] No attempt was made to identify respondents.[106] The questions asked by the survey were as follows:

1. Are you in private practice in Indiana? (If 'No' you need not answer the other questions. Please return the card.)
2. Are you receiving requests from third parties (insurance companies) for X-rays?
3. Are you presently sending X-rays to [45] third parties?
4. If the answers to questions 2 and 3 are 'No', would you send X-rays if requested?"[107]

34. Of 2,000 surveys mailed to IDA's members, 1,342 or 67 percent were returned[108] and of the 1,342 returns 1,268 or 95 percent were from private dentists.[109] The results of the survey by component societies, as tabulated by IDA's central office for IDA's top leadership at the time, are shown in Figure 5.[110] They reveal that statewide, although 811 members were getting requests for X-rays from insurers only 133 members were sending X-rays to the insurers.[111] Of another 407 members who reported neither getting requests nor sending in X-rays, only 29 said they would do so if requested, while 378 said they would refuse.[112] [46]

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[102] CX 142A.
[103] CX 64B.
[104] CX 144.
[105] CX 145A.
[106] CX 144.
[107] CX 145A.
[108] CX 145A.
[109] CX 145A.
[110] CX 145C.
[111] CX 145C.
[112] CX 145C.

Results of post card survey on x-rays by Component Societies (Jan. 28, 1975)	1. Are you in private practice in Indiana?		2. Are you receiving requests from third parties for x-rays?		3. Are you presently sending x-rays to third parties?		4. If the answers to questions 2 and 3 are NO, would you send x-rays if requested?		TOTAL RESPONSES
COMPONENT SOCIETY	Yes	No	Yes	No	Yes	No	Yes	No	
Ben Hur	15	0	4	11	0	15	0	10	15
East Central	85	4	34	51	1	82	0	49	87
Eastern Indiana	26	2	18	8	1	25	1	7	28
First District	105	3	61	44	4	99	3	39	108
Greene District	16	1	12	5	1	15	0	5	17
Indianapolis District	318	34	217	93	55	253	8	74	352
Isaac Knapp	105	4	83	22	4	101	1	20	109
North Central	128	6	63	62	4	122	5	54	134
Northwest	169	11	134	30	31	133	7	20	180
South Central	84	1	53	32	14	69	0	28	85
Southeastern	38	2	23	13	4	32	0	12	40
Wabash Valley	62	3	42	18	7	53	0	18	65
West Central	63	1	36	27	4	59	2	24	64
Western Indiana	56	2	31	22	3	47	2	18	58
Grand Total	**1268**	**74**	**811**	**438**	**133**	**1105**	**29**	**378**	**1342**

Figure 5

[47] 35. The percentage of dissidents in the three areas which would later spawn IFD (Anderson, Lafayette and Ft. Wayne) was a little less (6%) than in the state as a whole (16%) but it seems plain that, even viewed statewide, most Indiana dentists were or at least claimed to be refusing insurers' requests for X-rays as of early 1975. The inference is inescapable and we accordingly find that most Indiana dentists were not only agreeing in theory but following in practice the plan to boycott insurers sponsored by IDA during most of the 1970's.

36. The existence of an IDA conspiracy to deprive dental health care insurers of X-rays needed to determine insurance benefits seems well-established by the evidence reviewed above and it would seem unnecessary to elaborate further on it. However, Complaint Counsel have asked for additional findings on the subject with which we agree and which we now cursorily adopt. These are as follows.

37. Complaint Counsel point out (in CPF #66) that IDA leaders believed they needed unity to implement the Indiana Plan and the Principles of Acceptability and members were repeatedly so instructed. The record citations[113] support this. They point out (in CPF #67) that IDA officials repeatedly urged IDA members to refrain from submitting X-rays to third-party payers (or even to dentists' patients) and to refrain from cooperating with any plan requiring predetermination of benefits or alternate benefits features, frequently advising IDA members as to which dental plans were (or were not) in compliance with IDA's Principles of Acceptability. This proposed finding, too, is well-supported by the cited evidence.[114]

38. CPF #68 recites how IDA contacted numerous insurers, managements and labor organizations, informing them of IDA's Indiana Plan and that its members did not submit X-rays to insurers. This proposed finding, too, is supported by the record[115] as are the proposed findings [48] that IDA's CDCP and officers attempted to assert as much input as possible into the dental plan of General Motors and the U.A.W. prior to that plan's 1974 implementation date[116] and that IDA's CDCP and Board of Trustees urged all members to get their patients to write the Indiana Insurance Commissioner when dental insurance companies paid benefits at a lower level when X-rays were not submitted.[117]

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[113] CX 39B; CX 62; CX 71B-C; CX 73; CX 104; CX 135; CX 139C-E; CX 459J.

[114] CX 38A; CX 39A-B; CX 43B, D; CX 55; CX 62; CX 64B; CX 71A; CX 75A; CX 82A; CX 99G, I, K, L, N; CX 108A, B; CX 144; CX 47–Z6.

[115] CX 63A-B; CX 64B; CX 74A-B; CX 84C-D; CX 101A-B; CX 327S-T.

[116] CX 71A.

[117] CX 82A, C, D. The Insurance Department apparently received several such patient complaints but announced in May 1975 that an insurer's reduction of benefits when X-rays were not submitted constituted neither a violation of Indiana insurance law nor an "unfair claims practice" (CX 841).

F. *Two Boycott Targets*

39. The actual operation of IDA's group boycott is perhaps best understood by tracing its struggles with two leading dental health care insurers, Aetna Life and Casualty Insurance Co. and Connecticut General Life Insurance, both of Hartford, Connecticut, and both substantial, well-known, nation-wide enterprises. Other, smaller insurers had generally gone along with the Indiana dentists' demands.[118] Not so these two. The result in each case has been was a running battle, with ups and downs, that has lasted several years. Each account is illuminating.

1. Aetna-International Harvester-United Auto Workers

40. Pursuant to a collective bargaining agreement between International Harvester and United Automobile Workers, on July 1, 1971, Harvester's employees in 23 states, including Indiana, came under the coverage of a dental health insurance plan.[119] Indiana locations affected were Indianapolis, Ft. Wayne and New Albany (on the Ohio River).[120] The Aetna-Harvester contract contained both predetermination and alternate benefits features[121] **[49]** and Aetna's practice was to implement the latter by requesting and using X-rays to review benefit claims as necessary.[122]

41. Trouble started immediately.[123] A few days before the plan took effect Aetna officials met with representatives of IDA and its Ft. Wayne area component (known as the Isaac Knapp District Dental Society)[124] to discuss how the plan would work[125] but were told by the dentists that the submission of X-rays would violate IDA's Principles of Acceptability.[126] Promptly thereafter (6/30/71) a letter to all Indiana dentists from IDA's Council on Dental Care Programs notified them that the Aetna-Harvester plan did not comply with the Association's Principles and urged all dentists treating Harvester patients not to turn over dental X-rays either to Aetna or the patient.[127] Aetna countered with a letter on 7/1/71 to Indianapolis and Ft. Wayne dentists explaining its position and pointing out that its sole purpose in requesting X-rays, when it did, was to determine benefits pay-

[118] CX 39B.

[119] Tr 987, 1221. And *see* CX 222C.

[120] Tr 987, 1221; CX 222C.

[121] Tr 987.

[122] Tr 975–76, 987, 1219, 1238.

[123] Tr 987–89, 1242–43.

[124] CX 4B.

[125] Tr 1222; CX 197A.

[126] Tr 989–991, 1225; CX 197A. Again, at another meeting with Aetna later in July, IDA representatives repeated that the plan was unacceptable and that X-rays would not be submitted. Tr 1228–30.

[127] Tr 1234–35; CX 38A.

able.[128] The response was not encouraging.

42. While some Indianapolis dentists did submit X-rays to Aetna,[129] strong resistance was encountered in the Ft. Wayne area, where only a small percentage of dentists would submit X-rays to Aetna.[130] In August the Chairman of IDA's CDCP complimented the Isaac Knapp dentists on their [50] "all-out support" of IDA's Principles[131] and the November issue of IDA's Journal reported that 90 percent to 95 percent of all Ft. Wayne dentists were *"cooperating with Isaac Knapp and IDA and not sending X-rays in."* (emphasis added)[132]

43. It should be noted, however, that this near-unanimity of action by the Ft. Wayne dentists cannot be attributed entirely to agreement on the desirability of IDA's boycott policy; some was undoubtedly the result of powerful peer pressure. An Aetna dentist/executive who made the rounds of Ft. Wayne dentists on a special mission late in 1972 or early in 1973[133] testified that when these dentists were requested in the privacy of their offices to submit X-rays to Aetna there were two general reactions: "dentists who said despite the fact that you seem fair, I will not send X-rays to you; and others who said I would like to but I don't dare to."[134] Asked to quantify this division of opinion, the witness estimated that "the reaction of those we visited was about fifty-fifty."[135] This estimate tends to confirm that to a substantial extent the conformity achieved by IDA was an unwilling product of peer pressure.

44. In the face of this widespread refusal by Ft. Wayne dentists to submit X-rays to Aetna, how did Aetna deal with such a difficult situation? In general it proceeded to pay benefits for those dental procedures which were covered by the plan in any event, such as radiographs, prophylaxes, [51] certain fillings, root canal procedures, etc.[136] However, without X-ray proof of loss and generally without any other information on which to base a judgment Aetna declined to pay for various other procedures such as fixed bridge work and certain crowns.[137] During the first year under the Aetna-Harvester contract there accumulated something like 600 questionable claims which Aetna would not pay either in whole or in part, for lack of X-ray

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[128] Tr 1238; CX 274A-C.

[129] CX 80A; CX 222C.

[130] CX 196B; CX 213H; CX 222C; CX 227B; Tr 1243–44.

[131] CX 39B.

[132] CX 196B. The Journal added: "We hope that all of Indiana dentists will follow suit with the IDA principals (principles?) when the situation arises in their area."

[133] Tr 1274.

[134] Tr 1275.

[135] Tr 1276. Note that a much larger percentage of the Ft. Wayne dentists (50%) were telling Aetna that they did not really sympathize with the boycott than would be suggested by the 1975 data for the Isaac Knapp Society as reported in Figure 5 above (only 4 out of 101 sending in X-rays and only one other dentist saying he would have sent in X-rays if requested).

[136] Tr 1243.

[137] Tr 1243.

evidence.[138] It was the consensus of Harvester, U.A.W. and Aetna that many of these 600 claims were probably meritorious and that they had to be taken care of in some way.

45. Since the summer of 1971 Aetna had tried in vain to hire licensed Indiana dentists to review X-rays in its Indianapolis and Ft. Wayne claims offices.[139] To this end it had supplied IDA with a statement of criteria for dental consultants and asked for nominations but never received any.[140] By mid-1972, however, it had found licensed dental consultants: a Dr. Stone for its Indianapolis office and a Dr. Bohnke for its Ft. Wayne office.[141] Dr. Stone seems to have had relatively little trouble, so far as this record shows, but Dr. Bohnke had a great deal.

46. Bohnke, who lived about 20 miles from Ft. Wayne but was a member of the Isaac Knapp Dental Society, took on both responsibility for counseling Aetna's current claims work and—to satisfy Harvester and U.A.W.—a special assignment to re-review all of the 600 questionable claims which we have seen had accumulated during the first year of Aetna's contract because requested X-rays had not been submitted for the claims.[142] To accomplish the latter "one-time" job it was arranged for him to go to the office of each dentist concerned and work with the relevant X-rays and any **[52]** other diagnostic aids in the dentist's files.[143] This *modus operandi,* of course, came quite close to meeting IDA's unrealistic terms for insurer access to X-rays: "qualified" personnel to come to the treating dentist's office.[144] However, Dr. Bohnke also appealed to his fellow dentists to submit their X-rays to Aetna on request in the future[145] and this predictably evoked bitter enmity among his brethren of the Isaac Knapp Society.

47. On 1/29/73 a Dr. Scheele reported to Dr. James Frey, the Isaac Knapp Society's President-Elect, Chairman of its "Censor" Committee, and a future official of IFD, that he (Scheele) had been approached by Aetna "with a deal to take all their X-rays" [presumably whenever attending dentists declined to turn over their X-rays to Aetna] and elaborated that "I even received a personal call from their head consultant" (Dr. Bohnke) whom Scheele immediately informed of his own decision not to cooperate with Aetna.[146]

48. On 2/19/73 Dr. Frey reported this approach by Dr. Bohnke to

[138] Tr 1267.
[139] Tr 1264–65.
[140] Tr 1264–65.
[141] Tr 1264–65.
[142] Tr 1267.
[143] Tr 1267, 1274.
[144] *See* Par. 21, above.
[145] Tr 1268.
[146] CX 218.

the Isaac Knapp Society's Board of Directors, which promptly voted, on motion duly made and seconded, to recommend that:

Harold Bohnke, D.D.S., be censored for encouraging another dentist, Ronald Scheele, D.D.S., through cohesion (sic) to participate in dental treatment of patients which directly violate the Indiana Dental Association's Principles of Acceptability. Specifically a deal to take all of Aetna Casualty (sic) Company's dental X-rays, for the purpose of submitting these X-rays to their company.[147] **[53]**

49. Thereafter, (apparently to be entirely sure of their legal position before attacking Dr. Bohnke), Isaac Knapp's members on 3/14/73 unanimously amended its "Local Code of Ethics" to read as follows:

It shall be considered unethical and not prudent for the legally practicing dentists in the Isaac Knapp District Dental Society to release radiographs from the patient's file records, no matter what the intent or purpose may dictate, unless these said radiographs are to be sent to another dentist or physician for referral reasons.[148]

50. On 3/27/73 Dr. Frey wrote Dr. Bohnke a warning letter (Figures 6A and B), reciting the new amendment to the "Local Code of Ethics" and charging that "on numerous occasions" Dr. Bohnke had contacted various members of the Society with "a deal to take all of Aetna Casualty Company's dental X-rays for the purpose of submitting these X-rays to their company."[149] Dr. Frey then sternly admonished his colleague:

I would strongly recommend that you do not continue this policy. You would place yourself in a position of being censored for encouraging another Isaac Knapp dentist through cohesion (sic) to participate in dental treatment of patients which directly violates the Code of Ethics of the Isaac Knapp District Dental Society and the Indiana Dental Association's Principles of Acceptability.[150] **[54]**

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[147] CX 215. *See also* CX 216A recommending the censorship of Dr. Bohnke and adding: "This applies to any other member of Isacc Knapp." For similar efforts by Isaac Knapp members to discipline a Ft. Wayne dentist named Dr. Don Lloyd who had allegedly "openly submitted" X-rays to third parties, *see* CX 214A-C and CX 216B. The complainants wrote Dr. Frey: "We . . . will not sit idly by and let one oral surgeon control the majority of oral surgery performed on Harvester employees and their families, especially when he is doing this by direct violation of the Principles of Acceptability of our Society." CX 214B.

[148] CX 220A.

[149] CX 220A.

[150] CX 220A.

INDIANA DENTAL ASSOCIATION
A Constituent of the American Dental Association
1013 HUME MANSUR BUILDING • 317-638-1341 • INDIANAPOLIS, INDIANA 46204

CXID-220-A

President-elect

March 27, 1973

Harold W. Bohnke, D.D.S.
224 North 12th Street
Box 461
Decatur, Indiana 46733

Harold:

This letter is to inform you of the recent amendment to the Local Code of Ethics of the Isaac Knapp District Dental Society passed unanimously at the March 14, 1973 business meeting. The amendment reads as follows:

> " It shall be considered unethical and not prudent for the legally practicing dentists in the Isaac Knapp District Dental Society to release radiographs from the patients' file records no matter what the intent or purpose may dictate, unless these said radiographs are to be sent to another dentist or physician for referral reasons."

It has been called to my attention that on numerous occasions you have contacted several Isaac Knapp dentists with:

> " a deal to take all of Aetna Casuality Company's dental x-rays for the purpose of submitting these x-rays to their company."

I would strongly recommend that you do not continue this policy. You would place yourself in a position of being censored for encouraging another Isaac Knapp dentist through cohesion to participate in dental treatment of patients which directly violates the Code of Ethics of the Isaac Knapp District Dental Society and the Indiana Dental Association's Principles of Acceptibility.

INDIANA DENTAL ASSOCIATION
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CXID-220-B

President-elect

Harold W. Bohnke, D.D.S.
224 North 12th Street
Box 461
Decatur, Indiana 46733

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I hope that the contents of this letter are completely clear to you as a member of the Isaac Knapp District Dental Society. If you have any questions regarding this matter, please feel free to contact me.

Cordially yours,

Dr. James D. Frey, D.D.S.
IKDDS Chairman of Censor
and Public Relations

JDF/jc

cc: Dr. James Dumas
Dr. David Bleeke
Dr. Don Lahrman
Dr. Ralph Merkel

[56] 51. This record does not indicate that Dr. Bohnke was, in fact, ever "censored" but Dr. Frey's stern warning (along, no doubt, with other peer pressure) plainly had its effect. During the rest of the year 1973, under pressure from Harvester and U.A.W.,[151] Aetna proceeded apace with the program referred to in the Scheele-Frey letter, even buying a portable X-ray machine for the Ft. Wayne office.[152] This program called for Aetna's local office to itself begin taking the necessary X-rays (with a copy to the attending dentist) whenever an attending dentist indicated that he would not submit his X-rays to Aetna.[153] (This was to be determined in advance; if the attending dentist had already taken X-rays Aetna did not duplicate the X-rays but did an in-mouth examination).[154]

52. This program did not, in fact, get under way until January 1974, largely because Aetna could not until then get a licensed Indiana dentist to act as a dental consultant in its Ft. Wayne office.[155] Dr. Bohnke understandably declined to take on the new job, giving as his reasons that he feared criticism of his objectivity and an ethics charge by his peers.[156] What Aetna ended up doing was to bring Dr. Stone up from Indianapolis one day a week to read X-rays and make in-mouth examinations.[157] At an estimated extra cost of $47,000 (4,700 examinations @ $10 per estimation)[158] Aetna managed to keep its Harvester business at Ft. Wayne alive until November 1978, when this Commission's order in *Indiana Dental Association,* Docket No. C-2957 [93 F.T.C. 392], considerably relieved the pressure of IDA's [57] X-ray boycott.[159]

2. Connecticut General-General Motors/United Auto Workers

53. A collective bargaining agreement between the automotive giant, General Motors Corporation, and United Automobile Workers, negotiated in 1973, provided for a dental health care insurance program for GM's employees and their families, to become effective 10/1/74.[160] Among GM's many plants throughout the United States are several in Indiana, including two in Anderson which employ a large part of that city's population.[161] The embattled IDA dentists exerted themselves to see that the administration of the GM/UAW dental

[151] Tr 1277.

[152] Tr 1276.

[153] Tr 1277.

[154] Tr 1276, 1278.

[155] Tr 1276.

[156] Tr 1279.

[157] Tr 1276. In 1975 Dr. Stone was succeeded by a Dr. Levy, who ran the operation until 1978, when it was apparently no longer needed.

[158] Tr 1278.

[159] Tr 1321; and *see* RPF #12 (citing Tr 919, 922, 1282).

[160] Tr 391, 1760–62; CX 483A-B.

[161] Tr 874–75; CX 254A; CX 477C; CX 486B. Dr. McClure estimated that 95 percent of his patients were connected with GM. CX 327F; CX 390B.

plan was not given to Aetna[162] and, in fact, Aetna was by-passed by GM in favor of Connecticut General Life Insurance Co.[163]

54. Anxious to avoid a repetition of the misfortunes which had befallen Aetna,[164] Connecticut General started as early as August 1973[165] to meet with IDA to work out a mutually satisfactory way of administering the GM/UAW plan, particularly the troublesome predetermination and alternate benefit provisions thereof.[166] After a January 1974 meeting to go over the plan's provisions together a CG representative reported:

> The main emphasis of our meeting was the reiteration of the fact that Connecticut General was willing to work with the Indiana State Dental Association and that we would, in fact, treat them differently than they had [58] been treated by other insurance carriers (Aetna). Our whole thrust, therefore, was to instill in them the feeling that we were an organization that could understand their problems and would respond to them so long as they met us half way. I think we again accomplished this objective.[167]

55. CG's euphoria was justified only to a slight extent. CG wanted IDA's cooperation in persuading competent dentists to serve as dental consultants[168] and the IDA representatives readily agreed to help select dental consultants.[169] CG at this time also contemplated referring contested alternate benefit questions to a local Peer Review Committee[170] and the IDA people agreed to provide information on their 14 district Peer Review capabilities.[171]

56. On the critical issue of submitting X-rays, however, there was definitely no meeting of the minds. The four IDA representatives, headed by Secretary McClure (future IFD President) reiterated the Association's position that if CG wanted to send a professional dental consultant into IDAers' offices they would be willing to let him examine the X-rays but the CG representatives protested that this would be a "tremendous waste" of a professional's time and "no real compromise at all."[172] CG's spokesmen thought the provision of X-rays when needed as part of the proof of a claim was "legitimate" and "efficient" and, moreover, that there had to be consistent treatment for GM

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[162] Tr 224.

[163] Tr 391.

[164] CX 312A.

[165] CX 327D.

[166] Tr 392, 633, 1767, 1958.

[167] CX 303A. This and other citations to the GC minutes of the meeting of 1/9/74 (CX 303A-F) should be read in conjunction with the trial testimony of an attendant for CG (Chichester) concerning the same meeting, at Tr 401–11.

[168] Tr 402.

[169] CX 303C.

[170] CX 303D.

[171] CX 303D.

[172] CX 303E.

workers all over the country.[173] However, Dr. McClure remained "adamant", indicating that dentists in the Anderson/ [59] Muncie area were still unwilling to supply insurers with X-rays for pretreatment review[174] and could not be persuaded to release X-rays "even possibly to the Peer Review Committee, never mind a CG consultant."[175]

57. Despite CG efforts to maintain an aura of good feeling between IDA and CG,[176] Dr. McClure wrote CG's Director of National Accounts (Chernyka) on 2/21/74 that he felt they had "gotten off on the wrong footing" and that the dentists were now so "disillusioned" that it would be "virtually impossible to find the type of dental consultant you seek to help in the administration of the plan."[177] Without Chernyka's knowledge McClure sent a copy of this letter to UAW and GM who were much upset and told CG to get this straightened out immediately.[178] In a phone call to McClure, Chernyka greatly regretted that UAW and GM had been told of the problem; said he was telling McClure things he could not say in an open meeting and that the IDA people should not get upset over quality control (*i.e.*, the X-ray issue), as "it was just a lot of verbiage and it would be just what we as an association would want to make it."[179]

58. Another meeting was set up for March 19th,[180] at which the IDA representatives, headed by McClure, agreed to "put together a program of how we (IDA) believe you (CG) would obtain the most cooperation from Indiana dentists."[181] Such a program was outlined in a 4/19/74 letter on IDA stationery from McClure to Chernyka.[182] The first "good advice" by Dr. McClure was to remove all mention of radiographs from CG's claim form. He explained:

> We are certain you observed on March 19 that [60] Indiana dentists have a *definite and unified position* (emphasis added) with regard to use of radiographs. Indiana dentists are opposed to the improper use of radiographs by insurance carriers using them for diagnostic purposes as a base for determining alternate courses of treatment which are less costly.[183]

59. On the affirmative side, IDA was agreeable to supplying CG with a list of recommended consultants but wanted an opportunity to "review annually and submit recommendations regarding the con-

[173] Tr 407.
[174] CX 303E.
[175] CX 303F; Tr 408.
[176] CX 327E.
[177] CX 327F and G.
[178] CX 327H.
[179] CX 327 I-J.
[180] CX 327H.
[181] CX 327L.
[182] CX 327L.
[183] CX 327L.

sultants."[184] It proposed to replace the insurer's contingent of non-professional people screening incoming claims by programming norms such as utilization patterns, frequencies of occurrence, treatment patterns, etc. into a computer; the computer would then "red flag" particular claims for reference to a consultant to in turn consult with the treating dentists and, if still unresolved, then to be referred to IDA's peer review committee for adjudication—at a fee.[185] [IDA also suggested submission of any other problem cases for peer review.][186]

60. On 5/1/80 the McClure letter of 4/19/80 to Chernyka was answered by another CG official, Caffrey, whose attitude and approach seems to have been rather different from Chernyka's. Caffrey thought the proposed consultant program had "a lot of merit," gave "full support" to peer review and agreed to "look into" the possibility of computerized screening.[187] As for his policy on X-rays, however, it was the mailed fist in the silk glove. "We may have a problem on the question of radiographs," he wrote, in the understatement of the year.[188]

61. CG had "agreed" with GM and the UAW that radiographs would be reviewed as part of the basis for [61] determining benefits.[189] Caffrey was prepared to assure IDA that this would be done "in a proper manner," which turned out to mean only "by licensed dentists."[190] [It is not clear whether even this assurance covered "screening" as distinguished from full-scale "reviewing" of X-rays]. Nowhere did Caffrey explicitly raise an issue as to *whether* X-rays should be viewed in the attending office or the insurer's claims office; he quietly *assumed* the latter: "If the attending dentist would like, he can mail the claim form and radiographs to the attention of the dental consultant."[191]

62. Not surprisingly, Dr. McClure was furious. To the IDA members who had been meeting with Connecticut General and John Sparks of UAW he promptly sent copies of the Caffrey letter and his own reaction thereto:

> Caffrey's letter is contrary to everything that was promised or agreed to (at the 3/19/74 meeting). . . . I kept telling Chernyka that we couldn't see how they could promise us that there would be no X-rays when it was in black and white in the contract. He kept telling us that all the Union and Management wanted was results. So now we can see

[184] CX 327L.
[185] CX 327L.
[186] CX 327M.
[187] CX 327N-O.
[188] CX 327N.
[189] CX 327N.
[190] CX 327N.
[191] CX 327N.

that they are really in a bind and maybe they can't deliver on their promises.[192]

He further reported that on receiving the Caffrey letter he had immediately called CG headquarters in Hartford, conveyed IDA's feelings about being "misled", informed them that "there would be no way the Indiana dentists would agree to send X-rays to a consultant" and laid down the law: "I suggested that if CG wanted any cooperation from us they would send a telegram saying the letter was incorrect."[193] He further told Chernyka that IDA would not supply CG with a list of consultants if Chernyka expected them to diagnose from X-rays alone.[194] **[62]**

63. Although there were divided counsels within CG,[195] Chernyka caved in and agreed to send the wire Dr. McClure wanted. At first he worded it so that the X-ray question would be left up to the consultant and the treating dentist but McClure stonewalled and Chernyka thereupon agreed to say that any problems would be resolved before the Peer Review Committee.[196] The wire that was actually sent read:

Disregard ref. to radiographs and [in?] Caffrey's 5/1/74 letter. Question of radiographs to be resolved by Peer Review Committee if dental consultant and attending dentist cannot resolve whatever questions there may be.[197]

64. Dr. McClure was apparently satisfied with CG's promise that there would be no compulsory submission of X-rays. He recognized, however, that the apple cart might still be upset:

They will promise us anything to get (keep?) the Union (U.A.W.) from taking the contract away from them. I believe Sparks would take it away if he knew they had promised the no-X-ray bit. We must really zero in on our members and *educate them for the big confrontation we will have in the future. The only way we will whip it is by standing firm.* (emphasis added)[198]

65. On 5/23/74 Caffrey formalized CG's request for assistance in selecting dental consultants, specifically asking for two practicing general practitioners to work 6–12 hours a week in CG's Indianapolis claims office.[199] One of their duties was said to be to "advise on benefit determination on claims where there is a question on . . . **[63]** treatment"[200] but nothing was said about whether they would be reviewing

[192] CX 327P.
[193] CX 327P.
[194] CX 327P.
[195] CX 308A-B; CX 309A-B.
[196] CX 327P.
[197] CX 327R.
[198] CX 327Q.
[199] CX 313A.
[200] CX 313A.

X-rays at CG's office or at the offices of attending dentists.[201]

66. On 6/25/74 the Executive Director of IDA, writing for "the IDA Officers and Trustees representing the areas of Indiana having major GM plants" submitted to CGF's Caffrey three nominees from the Anderson/Muncie area, including Dr. James Pierce (of whom more later), one from the Kokomo area and one from the Indianapolis area.[202] Nothing in IDA's letter of nomination bore one way or the other on the submission of X-rays to CG.

67. All but one of the five nominees were hired.[203] On 8/7/74 CG asked Dr. McClure for more Indianapolis nominations[204] and on 8/16/74 McClure, writing on IDA stationery, nominated two more consultants, of whom one (Dr. Beavers of Indianapolis) was hired by CG.[205]

68. By late August IDA's Dr. McClure was hearing disturbing reports from CG's Indianapolis office manager that he was planning on using consultants to screen X-rays, that visits to dentists' offices were "prohibitive" in cost and that people high up in CG were already saying it was a "stupid idea" even to try to run the program without the X-rays.[206] Worried IDA leaders agreed among themselves to use the leverage of their consultant arrangements to try and **[64]** avoid submitting X-rays:

> [W]e will have to withdraw our support of the consultants if they (CG) try to use them to read radiographs in the claims office. I (Dr. McClure) have contacted the consultants in my area and alerted them to what is going to happen.[207]

69. The message went to CG's Indianapolis regional manager who testified "[t]hat if we persisted and proceeded along our normal lines and requested X-rays, that they (IDA) would in fact place pressure upon the dentists that were serving as consultants to resign."[208] When the manager discussed this threat with his consultants they explained:

> [t]hat they were members of the Indiana Dental Association and although they were reluctant and would not want to resign, that they felt an obligation and because of the pressure that would be placed on them to in fact resign.[209]

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[201] CG's Indianapolis Manager testified at trial that at this time Indianapolis consultants were expected to work in that office ("physically come into the office," Tr 654). If they could not work out any benefit problems from the diagnostic aids sent in with the claim form and by talking by phone with the claimant's dentist, the matter would be forwarded to the local dental consultant (*e.g.*, Pierce in Anderson) "for him to get involved in and to try to resolve." (Tr 654)

[202] CX 314A-B.

[203] Tr 651.

[204] CX 311.

[205] CX 378.

[206] CX 316.

[207] CX 316.

[208] Tr 669.

[209] Tr 671.

For whatever reason, the anticipated reversal of X-ray policy by CG did not then materialize.

70. Meanwhile, during the Summer and early Fall of 1974, with the GM plan set to start on 10/1/74, another source of difficulty between CG and IDA emerged. It concerned CG's GM claim form. As early as April Dr. McClure had advised CG to remove all mention of radiographs from its standard claim form.[210] The problem was that, contrary to IDA's advice, the form worked up by CG for use in GM plants throughout the country had a request for X-rays on the rear.[211] A CG Vice President on 5/13/74 explained that:

> We have desperately tried to avoid having to have separate claim forms and instructions for people receiving treatment in the State [65] of Indiana. We have tried very hard . . . to insist on uniform administration throughout the country.[212]

71. By September CG had apparently made a tentative decision to insert an IDA-approved clause in Indiana claim forms that would read: "The above section in regard to X-rays does not apply to IDA members."[213] Yet an internal CG memorandum of 9/11/74 reveals CG's continuing dilemma.[214] It was believed on one hand that to proceed with use of the standard claim form without some kind of Indiana exception (and to insist on uniform X-ray submission in Indiana) would probably entail dire consequences such as resignation of the consultants, no Peer Review mechanism, the end of communication with organized dentistry, instructions to all IDA members not to cooperate with CG and perhaps even a full fledged advertising campaign to discredit CG, etc.[215] On the other hand it was also recognized that the Union (*i.e.,* UAW) position would be decisive and the memorandum closed with a "hope" that CG could get a reaction from U.A.W. in order to properly evaluate the advisability of "reviewing our position in Indiana."[216]

72. A few days later Chernyka called Dr. McClure with a story that somehow word had "leaked out" about insertion of the Indiana exception in the GM claim form and that he had to go to Detroit to explain.[217] Gingerly, he asked what the reaction would be in Indiana if CG had to "back down" on this promise.[218] Dr. McClure replied immediately that the IDA membership would feel that they had been "lied to" and that it "certainly wouldn't help Connecticut General's

[210] CX 327L.
[211] CX 316.
[212] CX 308A.
[213] CX 312B and CX 327B.
[214] CX 312A-B.
[215] CX 312A.
[216] CX 312B.
[217] CX 327V.
[218] CX 327V.

image in Indiana."[219] **[66]**

73. Two days later Chernyka was in Indianapolis, direct from his visit to Detroit, with word that General Motors would not countenance an Indiana exception to the X-ray clause on the back of the GM claim form.[220] Still trying to ride both horses at once, however, Chernyka assured Dr. McClure that, whatever the claim form said, CG would *not* demand that the dentists send in X-rays. McClure, for his part, decided to "let" CG keep its consultants but to recommend that IDA members use their own model claim form.[221]

74. On the strength of these mutual understandings (thereafter known as "the gentlemen's agreement") Dr. McClure assured IDA's membership that "Connecticut General has given us a verbal agreement on no X-rays and if they (CG) do request them, our (IDA) Central Office should be notified immediately."[222] This precarious arrangement went into effect on 10/1/74.

75. During the first year and a half of experience with the CG-GM dental health plan the situation with regard to X-rays was quite complex. GM and UAW continued to insist that CG must have the right to obtain X-rays from dentists on request but CG had made a "gentlemen's agreement" with IDA not to exercise this right but, in fact, many Indiana dentists began sending in X-rays, anyway. From the Fall of 1974 to the Spring of 1976 the X-ray submission rates gradually increased in those parts of the state where CG had much business, except for the three areas that would shortly spawn IFD.[223]

76. CG's Indianapolis office eventually found itself getting about 50 percent of the X-rays it needed,[224]—except for those coming from the Anderson area, where only a "very low percentage"—about 2 to 4 out out of 40 dentists—would ever submit X-rays when requested by CG.[225] By the Spring of 1976 CG was getting about 70 percent of needed **[67]** radiographs from parts of Indiana where it had plants other than Madison County as compared with less than 1 percent from Madison County.[226] Moreover, the handful of cooperative dentists in the Anderson area made their submissions only rarely and covertly, for fear of the reaction of the IDAers.[227] Indeed, some Anderson area dentists told CG's Indianapolis manager frankly that "there was really fear that pressure would be placed upon them by dentists

[219] CX 327V.
[220] CX 327W.
[221] CX 327W.
[222] CX 327W.
[223] Tr 630, 682–83, 688–89, 732–33.
[224] Tr 630, 682–83, 688–89, 732–33.
[225] Tr 689. .
[226] Tr 812–14.
[227] Tr 812–13.

in the community" if they submitted X-rays.[228]

77. That CG really wanted the X-rays cannot be doubted. At various times during the first year and a half of the GM plan CG did raise the subject of requesting X-rays but on such occasions the IDA people would always suggest retaliation, as by withdrawal of IDA approval for CG's consultants.[229] In each case CG apparently backed away from such a prospect.

78. As a matter of fact, IDA seems to have held CG in such a vice that CG could not even discipline its consultants without raising a storm. Dr. James Pierce, CG's Anderson consultant, was reluctantly allowed to operate out of his own office in Anderson instead of CG's Indianapolis claims office,[230] even though this was a cumbersome, time-consuming, expensive, unsupervisable arrangement[231] which precluded valuable discussions with CG's Indianapolis claims personnel.[232] This was allowed because, in the absence of X-ray submissions, the only alternative offered by IDA was to send a consultant to each attending dentist's office at a professional hourly rate.[233]

79. Dr. Pierce was a member of the Madison County [68] Dental Society[234] and was unconditionally opposed to submitting X-rays to insurers.[235] On the stand he conceded that in five years as a dental consultant for CG he had "practically never" requested X-rays from treating dentists and had gone to a treating dentist's office to review X-rays on only one or two occasions.[236] CG could be pardoned for feeling it was getting something less than its money's worth from Dr. Pierce.[237]

80. Yet when CG stopped referring claims to Dr. Pierce and tried to process them through its Indianapolis office, using in-house consultants,[238] the Anderson area dentists were up in arms[239] and the Madison County Dental Society, sparked by Dr. McClure,[240] in March 1976 adopted a resolution that CG had not kept its "gentlemen's agreement" to use Pierce as a local consultant for that area.[241] Again CG bowed to this organized opposition; as of trial Dr. Pierce was still

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[228] Tr 684.
[229] Tr 671.
[230] Tr 432–33, 816.
[231] Tr 690–91, 816–17.
[232] Tr 433.
[233] Tr 434.
[234] Tr 2609.
[235] Tr 2598–2600; CX 160B.
[236] Tr 2565–72.
[237] A CG Vice President testified that CG could not have successfully conducted its dental insurance business in other states, using the same arrangements that it had with Dr. Pierce. (Tr 435–37)
[238] Tr 692–93.
[239] CX 327A-C; CX 319.
[240] CX 269; CX 270.
[241] CX 270.

handling CG claims in Anderson.[242]

[CPF #121 notes that Pierce had told CG's local manager frankly about experiencing "peer pressure" regarding the X-ray issue (Tr 817–18) but then denied this on the stand (Tr 2574). The Administrative Law Judge finds that the testimony of Dr. Pierce, who could remember hardly anything about anything, is entitled to little if any weight for any purpose.] **[69]**

G. *The Formation of IFD*

81. The earliest reference in this record to the possibility of organizing a union of Indiana dentists is a letter from an Anderson IDA member, Dr. Paul Van Dorn (later an IFD organizer), to the Chairman of IDA's Council on Dental Care Plans, dated 6/28/72.[243] In response to the Chairman's request Dr. Van Dorn reviewed his thoughts on how "federation or unionization" should be accomplished. He foresaw "nothing but trouble from the public if we involve the state association [IDA] directly in the dealing (sic) of this type" and suggested a separate entity (preferably a corporation) in which each IDA member would be given a "free subscription to the corporation" in the initial phase, "provided each member would sign a document similar to the document we had the people of Madison County sign, saying they would support the Indiana Plan and will stick together in adversity." (emphasis added)[244] He concluded his discussion with a plea for speed: "I think time is running out. The sooner we can get this accomplished the more likely we will not have trouble in the future. . . . If we have a strong union and our opponent understands this it will not be necessary for them to test our strength."[245]

82. Two months later, at an IDA Executive Committee meeting, attended, *inter alia,* by the Anderson area's Drs. Rohn and McClure,[246] reference was made to a pending proposal by a Dr. Robillard to form a labor union.[247] However, the group agreed that "the timing for such doesn't seem right" and a consensus called for a subcommittee of CDCP to *"develop the 'blueprint' for such an organization and have it ready when the time was right."* (emphasis **[70]** added)[248] Shortly thereafter (9/14/72) a "Robillard contact committee" was appointed, to be chaired by Dr. Van Dorn, who was also to

[242] Tr 2565–67.
[243] CX 436A-C.
[244] CX 436A.
[245] CX 436B.
[246] CX 51A.
[247] CX 51C. It seems likely that the Robillard proposal had prompted the request for the Van Dorn letter of 6/28/72 just described.
[248] CX 51C.

begin investigating the possibility of forming a "guild".[249] The CDCP Chairman commented:

Certain areas of Indiana which will feel the full thrust of overpowering third parties [e.g., General Motors] feel that they should be prepared when the action is not in their best interest.[250]

83. Writing on 9/27/72 for help from a Florida dentist experienced in such matters, Dr. Van Dorn recited his assignment to contact all people interested in *"unionizing or guilding dentists for more cohension [cohesion?] in bargaining with third parties"*[251] (emphasis added) and asked particularly for a mechanism of organization, membership requirements and "legal considerations".[252] The same emphasis on more effective bargaining with insurers through collective action may be noted in minutes of a 12/13/72 Isaac Knapp (Ft. Wayne) Dental Society meeting:[253]

Dr. Robert Gayle [of Ft. Wayne, later an IFD official] announced that he is on an active, working committee on the state level that is looking into the feasibility of forming a dental union *that could deal effectively in collective bargaining with 3rd parties.* (emphasis added).[254]

84. On 3/15/73 Dr. Van Dorn reported to CDCP on the progress of the unionization study.[255] Despite [71] expressions of skepticism by others present as to the feasibility of unionization (*e.g.,* Can dentists use the ultimate weapon: the strike?), Dr. Van Dorn urged the importance of continuing to study the mechanics of forming a union "now" so that it could be implemented promptly "if needed."[256] CDCP thereupon voted for an "informational Fall Workshop to study the effects of unionization with regard to the dental profession."[257]

85. At the Fall Workshop (9/13/73) Dr. Richard Oliver of Lafayette, a member of CDCP and another future IFD organizer,[258] shared the podium with an American Dental Association Assistant Executive Director for Legal Affairs for a one hour program on "The Unionization Movement for Self-Employed Health Professionals."[259] Whether prepared for this program or for some other occasion, the record contains a statement made by Dr. Oliver about this time (sometime

[249] CX 439A.
[250] CX439A.
[251] CX 439A.
[252] CX 440.
[253] CX 451B-C.
[254] CX 451C.
[255] CX 459F. *See also* CX 459N.
[256] CX 459F.
[257] CX 459F.
[258] CX 2B.
[259] CX 464B.

in 1972 or 1973)[260] entitled "Why Should A Dental Union Be A Separate Corporation And Not Part Of The Dental Association?"[261]

86. Dr. Oliver's ultimate conclusion was that while IDA could give a union its blessing and help it with initial financing and organization, nevertheless the union should be designed to operate as a separate corporate body.[262] In reaching a subordinate conclusion that professional societies make poor unions, he stressed, *inter alia,* the diversity of interests which subjects members to many pressures when confronted by "third party interference" and would, he thought, be "a *definite handicap in the cohesion necessary for a union to function properly.*"[263]

87. This record does not show what, if anything, came [72] of the Van Dorn Committee's work. During the next two years (1974–75) there was not much activity on the unionization front but the subject was not forgotten. On 9/18/74, during preparations for the GM contract to go into effect, Dr. McClure reassuring a GC Vice President that IDA dentists would not likely refuse to fill out pre-treatment forms for patients:

> I told them that I didn't think this would happen because *as an association we were cognizant of the antitrust line we have to walk.* Although I did explain to them that *certain very influential dentists had a contingency plan to immediately form a union to implement such a boycott if the screws get too tight.* (emphasis added)[264]

88. This is the earliest evidence in this record tying the reason for unionization to the antitrust problems inherent in a boycott by the state professional association. From contemporaneous evidence it appears that IDA was becoming sensitive to antitrust problems at this time because of its own experience.[265] Answering an out-of-state inquiry about the overall purpose of IDA's Principles of Acceptability the Chairman of IDA's CDCP wrote carefully:

> With recent involvement with the Sherman Antitrust Act, organizations such as the IDA must be very careful in determining what is unacceptable and the manner in which our members are informed of this. There is the potential that we could be charged by the Justice Dept. as being in restraint of trade. As it is now we determine which [dental health insurance] plan does not appear to be in the best interests of the dentist-patient relationship and the general membership is informed of the general picture. They have to react as individuals.[266] [73]

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[260] CX 1Z–37; Tr 2150–52.

[261] CX 455A-B.

[262] CX 455B.

[263] CX 455A.

[264] CX 327W.

[265] CX 74A.

[266] CX 74A. The IDA idea of what does not constitute a trade conspiracy is further illumined later in the same document: "We can't, as an organization, mandate anything binding on our members—we can only point out deficiencies in a situation." CX 74D.

89. During April 1975 IDA's Assistant Executive Director was writing to the American Federation of Physicians and Dentists (a medical "union") to obtain an update on AFPD's activities, certain written materials used at a collective bargaining seminar at Cornell University and "any suggested reading resources concerning the subject of professional unions."[267] Clearly the thought of unionizing IDA was still alive, if not robustly so, in the Spring of 1975.

90. Two months later, on 6/16/75, the U.S. Supreme Court handed down its epoch-making decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), which held, *inter alia,* that Congress did not intend any sweeping "learned profession" exclusion from the Sherman Act; tightened up the tests for a *Parker* v. *Brown* (state action) defense; and further liberalized the interstate commerce requirement in such cases. The shocking impact of *Goldfarb* on the thinking of IDA's leaders comes across clearly in an official review of events prepared 3 years later by IDA unionization advocate Dr. Oliver of Lafayette for Respondent IFD:[268]

This *[Goldfarb]* decision by the Supreme Court, while not its main intent, lowered past barriers to antitrust scrutiny of the professions by the Federal Trade Commission.

* * * * * * *

Before the ink was dry on *Goldfarb* the F.T.C. began an intensive, nonpublic examination of the health care area, increasingly turning its attention to activities of the professional organizations of the providers of care.[269]

91. Early in 1976 the Madison County dentists resurrected consideration of unionization for dentists.[270] A committee to study the possibility worked under Dr. McClure for several months, meeting twice in Anderson.[271] **[74]** On 5/24/76 Dr. Rohn, Chairman of IDA's CDCP, put an item entitled "Report of Madison County Investigation into a Dental Union" on the agenda for the next quarterly meeting of the Council (tentatively scheduled for 7/29/76 but actually held on 8/14/76). The minutes of the Council meeting show that after all other business was taken care of (and reported in some detail) the meeting was "adjourned to discuss the Union movement in the Anderson area," regarding which, however, the minutes are totally silent.[272] The minutes do state:

[267] CX 467.
[268] CX 583.
[269] CX 584D.
[270] CX 22A.
[271] CX 468.
[272] CX 108H.

Several (Council Members) pointed out that for months, years we (IDA) have been discussing the radiograph problem and members have been calling for action. It is time some action was taken.[273]

Ten days later the Indiana Federation of Dentists was born.[274]

92. On 8/24/76, 47 dentists from the Anderson area met there; heard Dr. Rohn expound on the pros and cons of unionism; listened to a study committee's report and proposal (delivered by Dr. McClure) for Madison County dentists to form a "union" to be affiliated with the American Federation of Physicians and Dentists; and voted 40 to 7 in favor of Dr. Pierce's motion to form such a union.[275] A second chapter was thereafter (3/30/77) formed in Lafayette[276] and a third somewhat later (4/9/78) in Ft. Wayne.[277]

93. The Constitutions and By-laws of the State Federation and each of its three local chapters are of [75] record here,[278] as are 2/1/79 membership lists for each chapter: Anderson (46 members; about 39 "current"),[279] Lafayette (27 members; about 23 "current"),[280] and Ft. Wayne (19 members; "current" members not differentiated).[281] On 1/15/77 the American Federation of Physicians and Dentists granted IDF a charter which recited the national federation's credo that:

only in and through a *united effort* can we be assured of receiving full and just compensation and due appreciation for our services, do hereby *band together* and establish this national union.[282] (emphasis added)

94. The sequence of events just reviewed suggests that *it was primarily consciousness of the antitrust risk inherent in IDA's organized boycott of Indiana's dental health care insurers—much magnified by the Supreme Court's 1975 ruling in Goldfarb—which led to the 1976 Madison County study of unionization and the eventual implementation thereof by the organization of IFD on 8/24/80.* There is an abundance of evidence to confirm this inference.

95. IFD's first press release, on 8/25/76, quoted President McClure (in part):

Noting that unions are exempt from antitrust laws, he says that unionizing will enable dentists to be heard in negotiating with insurance companies on the quality of care and conditions of treatment. Long active in . . . the Indiana Dental Association, Dr. McClure

[273] CX 108C.
[274] CX 22A-B.
[275] CX 22A-B.
[276] CX 534.
[277] CX 566B.
[278] CX 13A-Z2; CX 14A-Z; CX 15A-W; CX 16A-Y.
[279] CX 18A-B.
[280] CX 19A-B; *see also* CX 20A-C for past membership (similar).
[281] CX 21.
[282] CX 17.

stated that *such organizations are subject to antitrust laws and therefore without the bargaining power of a union.* (emphasis added)[283]

96. On 8/27/76 IFD's and IDA's joint public relations [76] counsel[284] wrote the Editor of "Dental Economics" in behalf of her client:

. . . *[U]nions are not governed by antitrust laws.* . . . The union leaders, I think, view the union as a *complement to the Indiana Dental Association,* with each having its separate function although *the general purpose of both is the same.* (emphasis added)[285]

97. Dr. David Yater, an Anderson area dentist and member of IDA's CDCP who had become IFD's first Secretary,[286] on 9/8/76 explained to the Chairman of CDCP why a union was thought "the most viable alternative":

Having attended the last two House of Delegates sessions and Council on Dental Care Programs meetings, *I have been aware that there is a prevailing sense of apprehension in respect to antitrust liability.* The association [IDA] has been *consistently warned by legal council (sic) to be very careful* in its actions and the wording of all official responses to third parties regarding our policies and positions. With the *very real spectre of antitrust violation* hanging over their head the Council is having increasing difficulty formulating a positive action in behalf of the membership, in view of the recent FTC suit and investigation, and the proposed and anticipated actions of the Justice Department in these areas. *One of the major advantages to unionization is the unquestioned immunity to [from?] antitrust liability.* (emphasis added)[287] [77]

98. In a "status report" to a Ft. Wayne dentist on 10/26/76, Dr. McClure described the labor union front quite colorfully:

We have always been very unified in the Anderson area but now we feel much more secure not having the antitrust albatros around our neck. (emphasis added)[288]

99. This is not to say that there was no other precipitating factor in the organization of IFD. Indeed, it appears that during this period there was a serious concern in the minds of IDA leaders, when CG installed a new manager in its Indianapolis claims office, as to whether CG was about to "welch" on its "gentlemen's agreement" not to request X-rays. (*See* particularly a 6/16/76 letter from Dr. McClure to a CG Vice President reporting these rumors): "I cannot believe you would shake my hand and look me straight in the face and tell me that

[283] CX 477A-C.

[284] A Ms. Barbara Rafferty of the Indianapolis public relations firm of Caldwell & Van Riper was the official "IDA Public Relations Counsel" (CX 8L; Tr 769) and also serviced IFD when it was formed (CX 33G, CX 35A, CX 476A-C, CX 477A-C).

[285] CX 476B.

[286] CX 2C.

[287] CX 484A.

[288] CX 489B.

Connecticut General would work without X-rays in Indiana if you didn't mean it. . . . This was a firm commitment. . . . Have you changed your policy with regard to radiographs in Indiana?"[289]

101.* McClure simultaneously took his old papers to John Ruckelshaus, Legal Counsel to Madison County Dental Society,[290] to see what could be done about enforcing the "gentlemen's agreement".[291] [He eventually learned that there was not much that could be done].[292] At IDA's CDCP's Summer session (8/14/76) it was reported that CG had changed its position with regard to requesting radiographs while still using IDA-approved dental consultants but it was decided to "leave the situation as it is" for the present.[293] This confrontation between IDA and CG was still going on when IFD was organized[294] a month later and almost certainly contributed to the feeling that it was time for a union. [78]

102. Moreover, a union would no doubt be a good vehicle for IFD's purposes, even if there were no antitrust risks to consider. CDCP member and IFD Secretary Yater, for example, wrote CDCP's Chairman that IDA was "not designed nor intended to represent us in socio-economic or political areas" and

> [w]e feel that to ask the Indiana Dental Association to continue to expand the scope of involvement into areas it was never intended to enter will eventually force a reconciliation (resolution?) of the issues in a Court of Law with the strong possibility of our receiving an adverse ruling. It is our opinion that *a more suitable vehicle is needed* to present [*sic*] us in these areas and that a union is the most advantageous choice to satisfy the needs previously mentioned. (emphasis added)[295]

Dr. McClure put it more pungently in a report to IDA's Board of Trustees on IFD's recent organization:

> He noted that about 80–90% of dentist practices in the Anderson area is [*sic*] covered by one insurance carrier; therefore *the dentists there believe they need more muscle than organized dentistry can give them.* (emphasis added) They found that via a union they could go beyond dental association activities. In their opinion *the union movement will not weaken the IDA but will supplement it.*[296]

103. And finally, according to Secretary Yater, it was important:

> to give our members a new banner around which to rally and to forge new feelings of

[289] CX 323A-B.

* There is no finding numbered 100.

[290] CX 323B.

[291] CX 327A and C.

[292] CX 108C.

[293] CX 108E.

[294] CX 328A-B.

[295] CX 484A-C.

[296] CX 486B.

unity and purpose.[297] [79]

This last explanation is particularly revealing. It makes clear that the formal organization might be new but the fight and the fighters were the same: they needed only a new banner and rededication to the cause. As IDA's and IFD's public relations counsel put it, "each (has) its separate function" but *"the general purpose of both is the same."* (emphasis added)[298]

104. These contemporary expressions of the IFD leadership leave no doubt that this organization must be viewed realistically as a new facet of the same old conspiracy to keep dental X-rays out of insurers' hands which had been carried on by substantially the same dentists lo those many years. Stated conversely, the founders of IFD decided to grasp the banner which, in IDA's hands, seemed in danger of falling. Whether viewed as an "adoption" of IDA's conspiracy or a "continuation" thereof makes no practical difference: IFD had joined IDA in the fight.

105. The "objectives" of this new (IFD) facet of the old (IDA) conspiracy are expressed quite clearly in its state and local constitutions.[299] As noted earlier, IFD's most significant organizational purposes are as follows:

a.) To represent dentists in all socio-economic matters, negotiations and grievances with employees, third and fourth parties or any group that is involved in financing or delivery of dental care.

* * * * * * *

b.) To seek to insure adequate compensation and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings;

c.) The establishment or approval of [80] appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care;

d.) To associate together all dentists for their mutual benefit and protection;

e.) To unite the efforts of dentists in obtaining and preserving the individual freedom of action necessary for the success of their professional endeavors.[300]

106. Among the methods of achieving these "objectives" which are "contemplated by IFD's Constitution are *"strikes, job actions, boycotts and other forms of economic pressure."*(emphasis added)[301] Telling the

[297] CX 484A.

[298] CX 476B.

[299] CX 13A-B (State federation); CX 14A-B (Anderson Chapter); CX 15A-B (LaFayette Chapter); and CX 16A-B (Ft. Wayne Chapter).

[300] CX 13A-B. Also quoted in Par. 2 above.

[301] CX 13Q; CX 14Q; CX 15P; CX 16Q.

IDA Board of Trustees on 10/1/76 about the recent formation of IFD, Dr. McClure confided that he "hoped they (IFD) would not have to resort to a strike or economic pressure" but that "if they were to be a true union this may become necessary."[302]

107. Membership in IFD is restricted to Indiana-licensed dentists who will "endorse" the above "objectives."[303] A constitutional provision for "discipline" of IFD members includes censure, fine, suspension or expulsion for "valid cause", expressly including, *inter alia*, "failure to conform to the Constitution and By-laws" or "any action detrimental to the welfare of the organization. . . ."[304]

108. The specific embodiment of IFD's policy with respect to X-rays was formally adopted by the membership after several months study and discussion, on 4/24/77.[305] Known as the "Work Rule," this counterpart of IDA's "Principles of Acceptability" reads as follows: [81]

> Proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids, with a history and with all clinical findings. No one facet of this process is now, or ever has been recognized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to sub-standard care.
>
> The patient's dentist, therefore, has a *moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose, without the benefit of a complete examination* which takes into account all of the elements described.[306]

109. IFD's Work Rule does not, as Respondent now contends,[307] merely state a general principle of dental science. The underlined portion above clearly places on a member dentist a duty to *act* to prevent a diagnosis for *any* purpose (thus including a diagnosis for payment of insurance benefits) without a "complete examination" (thus excluding a determination based only on X-rays). This interpretation from the plain language of the Work Rule was confirmed by Dr. Rohn, the movant for adoption of the Work Rule,[308] in a 7/27/78 letter to an insurer that had requested X-rays:

> Counsel for the Indiana Federation of Dentists, of which I am a member, has advised me that by complying with your demands for diagnostic radiographs and pre-treatment plans for evaluation I could be in violation of the Indiana statutes that regulate the practice of dentistry. Also, Counsel has advised that such practice does contradict the Union Work Rule on such procedure.[309] [82]

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[302] CX 486B.
[303] CX 13C; CX 14C, CX 15C; CX 16C.
[304] CX 13T-U; CX 14S; CX 15Q; CX 16R-S.
[305] CX 537A.
[306] CX 537A.
[307] RPF, page 3.
[308] CX 537A.
[309] CX 698. *See also* CX 674; CX 696 and CX 705.

110. The application of formal sanctions against dissidents for violation of IFD's Work Rule has apparently been minimal largely because of lack of necessity for such sanctions. In the three areas of Indiana where anti-insurer feeling was strong enough to spawn IFD it is inferable that collective action has been largely voluntary and even enthusiatic on the part of many if not most dentists. Dr. Yater, the dentist who represented Anderson on IDA's Council on Dental Care Programs and became the first Secretary of IFD,[310] confided to the Council's Chairman on 9/8/76:

> We don't anticipate any holdouts and have kept the retaliatory and economic pressures we could apply to non-members very low key and tried not to threaten any of our members.[311]

111. Shortly thereafter (9/28/76) Dr. Yater nevertheless raised the question of "policy on possible retaliatory gestures and action that could be taken against dissident members."[312] A committee of four, not including Dr. Yater, was appointed to report and recommend upon the question of "such measures that could be taken against dissident members by the Indiana Federation of Dentists."[313]

112. Two weeks later (10/12/76) the IFD Executive Committee discussed "discipline or acts of reprisal against non-member dentists and dissident members."[314] The minutes read:

> After lengthy discussion the general consensus was that *lawful severe measures would be instituted only as a last resort,* but that the attorney for the organization should be asked to advise the Executive Committee [concerning] the lawful measures that could be taken in such [83] cases." (emphasis added)[315]

The leadership's silk glove/mailed fist policy to discipline dissidents "only as a last resort" could hardly have brought great cheer to any free spirits among the Anderson dentists. Moreover, that "unity" was to some extent enforced as well as inspired can be inferred from the fact that the few Madison County dentists who did occasionally submit X-rays to CG during 1976–1977 frequently followed up with a phone call asking CG to "make sure that nobody else knew they (X-rays) were in fact submitted. . . ."[316] [84]

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[310] CX 2C.
[311] CX 484B.
[312] CX 512A.
[313] CX 512A.
[314] CX 522.
[315] CX 522.
[316] Tr 813.
[317] Footnote omitted.

H. *Effectiveness Of The Boycott*

113. Whether voluntarily or to some extent involuntarily involved, the members of IFD stand committed to a concerted refusal to furnish their patients' X-rays to dental health insurers. Since the offense of trade conspiracy, unlike other kinds of conspiracy, is complete when agreement is reached, with or without commission of any overt acts in furtherance thereof, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 225 (1940), we might stop here. In this case, however, there is abundant evidence that IFD has actually carried out the IDA/IFD boycott scheme as planned. Accordingly, we now briefly review its unlawful activities pursuant to the conspiracy already established.

114. The primary evidence on this branch of the case is a number of written refusals by members to submit X-rays requested by insurers, most of them (at least after formal adoption of IFD's Work Rule) in a form recommended by IFD or otherwise linking the refusal to IDA/IFD policy[318] (An illustration of the IFD form is seen in Figure 8).[319] While such evidence is not as comprehensive as the earlier IDA compliance surveys *(see* Pars. 31 and 34), the written IFD refusals in evidence here are sufficient to show widespread compliance by members with the IDA/IFD boycott policy.

115. Other evidence in this record pictures the operation of the boycott since IFD's formation, from the viewpoint of various insurers, employees and labor unions. We cite two examples. [85]

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[318] CX 622; CX 626; CX 628; CX 633 *(in camera);* CX 637 *(in camera);* CX 641; CX 656; CX 657; CX 658; CX 659; CX 660; CX 661; CX 662; CX 663; CX 664; CX 665; CX 666; CX 668; CX 669; CX 671; CX 672; CX 686; CX 687; CX 688; CX 689; CX 707; CX 709; CX 712; CX 716; CX 722; CX 724; CX 725.

[319] CX 683.

JAMES D. FREY, D.D.S.
PROFESSIONAL PARK WEST
4600 U. S. HIGHWAY 24 WEST
FORT WAYNE, INDIANA 46804

April 18, 1978
Insured: Ned J. Boylan
Patient: Patricia Boylan

Dear Sir:

Reference your request for x-rays for the above named patient. It is the policy of this office to provide all diagnostic aids to third parties on an in-office basis and with the consent of the patient. It is my belief that proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids with a history and all clinical findings. No one facet of this process is now, or ever has been, reconginized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to substandard care.

If you will have your consultant. contact my office to set up an appointment, I will furnish records and ask the patient to be present for an examination. If you do not feel this is possible, the Indiana Federation of Dentists, of which I am a member, will help you, if possible, to provide a local consultant.

Sincerely,

James D. Frey, D.D.S. JDF/jg

cc:

patient.

Mr. Ronald Fowler, attorney Indiana Federation of Dentists

Mr. Ronald Fowler
401 Citizens Bank Building
Anderson, In. 46016

[86] 116. *Connecticut General/General Motors.* It will be recalled that CG had a "gentlemens' agreement" with IDA (actually with the IDA dentists who later formed IFD) not to insist on dental X-rays for General Motors workers in Indiana.[319] At the time IFD was formed in August 1976 there was concern that CG might be about to breach that agreement[320] and, in fact, in January 1977 CG's Indianapolis office began "testing the waters" by asking for X-rays, to determine whether enthusiasm for the boycott might be waning.[321] It quickly found no diminution of enthusiasm.

117. Although not contacted by the IFD member from whom CG had requested the X-rays,[322] CG's manager was called shortly by Dr. Rohn (then Vice President of IFD) and Dr. Pierce, CG's consultant who also sat on IFD's Executive Committee,[323] both checking on whether CG's policy had changed.[324] Thereafter IFD also sent a 3 man delegation to determine whether CG was going to require submission of X-rays,[325] to which the manager responded that CG intended to do so on occasion.[326] The meeting was concluded on such a hostile note that CG's manager refrained from making any further requests for X-rays from Madison County (the Anderson area) for fear of a confrontation which would end all existing cooperation and snarl the payment of GM workers' claims.[327] When CG's manager left the area in November 1977, the submission of X-rays from Madison County was no greater than ever.[328] [87]

118. *Metropolitan/Brockway Glass.* Metropolitan Life Insurance Co. of New York is the group dental health insurer for Brockway Glass Co., a multi-state employer with 450–500 employees in its Madison County, Indiana plant.[329] X-rays are needed by Metropolitan to administer benefits under the alternate benefits feature of Brockway's group dental insurance plan.[330] However, from April 1976 thru at least January 1978 (when the witness left the area) local dentists refused to submit X-rays to Metropolitan and Metropolitan simply declined to pay on claims when X-ray requests were refused.[331] In view of the delay and hardship which this tug of war was causing for Brockway's employees, its Personnel Manager and the President of

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[319] *See* Para. 74 above.

[320] *See* Para. 99 above

[321] Tr 870–872.

[322] Tr 871, 890–891.

[323] CX 2A; CX 22A-B; Tr 870–872.

[324] Tr 871.

[325] CX 528.

[326] Tr 873.

[327] Tr 877–878.

[328] Tr 879.

[329] Tr 1611–1612. Nationally, Brockway has 10,000 employees in 13 plants, all covered by the same (Metropolitan) dental care insurance plan. Tr 1611.

[330] Tr 1612–1613.

[331] Tr 1614–1615, 1635.

the local (Glassblowers) union made efforts to talk IFD's Dr. McClure into submitting X-rays but were unsuccessful.[332] When the Personnel Manager left the area in early 1978 the impasse had not been resolved.[333]

119. In summary, the record here abounds with convincing evidence that the IDA/IFD conspiracy to boycott the dental health care insurers serving Indiana has actually been carried out until recently. Continuation of the boycott must be presumed in the absence of proof to the contrary, which has not been made here.[334] [88]

I. *Restraint of Trade*

120. Under Section 1 of the Sherman Act, 15 U.S.C. 1, and so under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, it is *per se* an unlawful restraint of trade for two or more businessmen to *agree* not to deal with another businessman. *Klors Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1958). While one businessman may ordinarily decide *individually* that he does not desire to do business with another, *United States* v. *Colgate & Company,* 250 U.S. 300, 307 (1919),[335] "group boycotts or concerted refusals to deal clearly run afoul of Section 1 of the Sherman Act." *Times-Picayune* v. *United States,* 345 U.S. 594, 625 (1953). This is true even if the boycott is intended to serve what the boycotters conceive to be a laudatory social purpose, as in the noted case of a boycott against so-called "style pirates". *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941). The rationale of the *per se* rule against such concerted refusals to deal is that society will not tolerate private rivals of governmental authority. Except for the statutory exception for labor unions, 15 U.S.C. 17 and 29 U.S.C. 52, individuals must generally exercise their economic power individually, not jointly.

121. We have hitherto reviewed in considerable detail the nature and history of the boycott charged here. The evidence has shown that for at least the past decade there has been a largely successful organized effort by IFD, IDA and the members of both, to keep Indiana dentists from submitting requested X-rays to dental health care insurers serving that state and particularly the Anderson, Lafayette and Ft. Wayne areas.

122. That neither IFD nor any dentist member stands in the rela-

[332] Tr 1620 *et seq.*

[333] Tr 1638.

[334] "When the existence of an object, condition, quality or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period." 2 *Wigmore on Evidence,* 3rd Ed. (1940), § 437, p. 413.

[335] "In the absence of any purpose to create or maintain a monopoly, the (Sherman) Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal" (p. 307).

tion of competitor to any insurer—a point urged by Respondent[336]—is quite immaterial. The target of a boycott need not be a competitor of the boycotter:

As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This (U.S. Supreme) Court also has [89] held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers." *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531 (1978).

Here there is technically neither a competitor nor a buyer/seller relationship between boycotters and boycottees but there are similar economic relationships susceptible to abuse. The insurers broadly represent the economic interest of the dentists' patients and to that end need access to the patients' X-rays for cost-containment purposes. Group action to shut off[337] insurers' access to the X-rays is precisely the kind of organized economic squeeze play against which the boycott rule is aimed.

123. That would seem to be the end of this case but for a question which has recently evoked much argument and as to which the law is still in an unsettled state: *Do the same antitrust rules apply to professional services as to commodities?* In 1975 the Supreme Court in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975) held that professionals are *not,* (as had long been widely believed)[338] entirely exempt from the antitrust laws just because they are professionals. On the other hand, the same opinion suggested that what would constitute a *per se* offense in a trade conspiracy case involving the sale of commodities might require a more extensive economic investigation (*i.e.,* the "rule of reason" should apply) if professional services are involved: [90]

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions concepts which originated in other areas. The public service aspect and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context be treated differently. We inti-

[336] RPF, page 16.

[337] "Shut off" is not too strong a term under the circumstances here. It is true that most dentists have typically expressed their willingness to let insurers' "qualified" experts come to their (the dentists') offices to look at X-rays and other diagnostic aids (CX 99W). However, there is abundant testimony in this record that that is an empty offer because it is not economically feasible for the insurers to send experts around to each dentist's office (Tr 341–42, 924–25, 978, 1121, 1232, 1383–1384, 1457; CX 303E, CX 316).

[338] The point was expressly reserved by the Supreme Court in *American Medical Association* v. *United States,* 317 U.S. 519 (1943), but wishful thinking on the part of professionals long chose to assume there was no problem. *See,* for example, CX 584D.

mate no view on any other situation than the one with which we are confronted today. (pp. 788–89, fn. 17)

124. In *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 696 (1978), the Court warned that this passage from *Goldfarb* "cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions" but did "adhere" to *Goldfarb's* view that:

professional services may differ significantly from other business services, and accordingly, the nature of the competition in such may vary. *Ethical norms may serve to regulate and promote this competition and thus fall within the Rule of Reason.* (p. 696)

125. Assuming, merely for argument, that the Rule of Reason is applicable to the facts of this case, the central question here is *not* whether there are any *pro*-competitive factors to be weighed against the *anti*-competitive factors already established.[339] No showing of *any* pro-competitive factor has been made or even attempted by Respondent or the State. The question is rather whether a *non*-competitive factor (*i.e.,* one which affects competitive conditions neither beneficially nor adversely) may be weighed in the balance. Specifically, the claim here is that the boycott in question promotes the health and [91] safety of Indiana citizens by preventing insurers from reducing insurance benefits below proper levels, thereby, as a practical matter, it is alleged, probably preventing an unhealthy reduction in actual treatments, too.[340]

126. The law on whether health/safety factors may properly be weighed in the balance against evidence of anti-competitive tendency is still in process of development and no sure answer can be given. In *Professional Engineers* the Supreme Court seemed to emphasize that generally the *only* evidence admissible in an antitrust case to counter an anti-competitive showing is evidence of a pro-competitive effect:

Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. (p. 688)

127. Yet, as just noted, in the same opinion the Court also quoted *Goldfarb's* teaching that: "Ethical norms may serve to regulate and promote this competition and thus fall within the Rule of Reason". (p. 696) This pronouncement was footnoted as follows:

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[339] *See* discussion in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 687–692 (1978).

[340] For our skepticism concerning the alleged nexus between reduced payments and reduced treatment, *see* Par. 148 below.

Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting public from harm or itself from product liability. *See, e.g., Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (CA3 1970) (en banc); *cf., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. at 55, n.23. (emphasis added) (p. 696, fn.22)

128. Very recent consideration of the question is found in this Commission's decision in *American Medical Association,* D. 9064 (Slip opinion of 10/12/79 at pages 26 and 37) [94 F.T.C. 701 at 1003, 1012]. Announcing that the Commission was not yet prepared to view restraints on professional price advertising as a *per se* offense, Commissioner Clanton wrote: [92]

In addition, we recognize that professional services may differ in some respects from other businesses (citing *Professional Engineers* and *Goldfarb*). Arguments suggesting that competition is contrary to the public interest are not cognizable under the rule of reason, but other justifications for ethical norms, such as the facilitation of non-deceptive advertising, may be procompetitive and must be taken into account. (p. 26)

129. Later, after finding certain of AMA's activities to constitute unreasonable restraints of trade (and so unfair methods of competition) because they bore "little relation" to their professed ethical purpose to "prevent impairment of medical judgment and deterioration of medical care," Commissioner Clanton elaborated as follows:

Whatever the extent to which quality of care concerns are cognizable under the antitrust laws. . . . the restraints here go far beyond anything that might be reasonably related to the goal of preventing use of improper medical procedures. (p. 37)

130. It is apparent that the proper role of health/safety evidence in rule of reason restraint of trade cases has yet to be worked out. If, as we have concluded here, a "group boycott" is unlawful *per se,* the health/safety question need not be answered. If, however, this Commission and the courts continue Commissioner Clanton's preference to treat professional boycott cases under the rule of reason, a rule for health/safety evidence must be settled. Practical considerations point this Administrative Law Judge strongly to consideration of health/safety factors in such a balancing of equities, even if health and safety factors are really neither pro nor anticompetitive.

131. However, this assumes that the health and safety factors are real and not just the overly broad "ethical principles" which Commissioner Clanton eventually decided should properly be disregarded in AMA. In order to determine what, if any, genuine health/safety factors we should consider here under a rule of reason, we turn now to analysis of the deficiencies in Indiana insurers' medical practices

alleged by IDA/IFD to justify their members' continuing concerted refusal to submit requested X-rays to such insurers. [93]

J. *The Medical Issues*

132. IDA/IFD's campaign to keep Indiana dentists from turning patients' X-rays over to dental health care insurers has always been based principally on IDA/IFD's claim that the insurers rely largely or even solely on X-rays when making diagnoses that should not be made without recourse to *all* available diagnostic aids (including clinical oral examinations, narrative reports and all the bio-chemical tests now available from commercial laboratories). During the IDA stage of the conspiracy that Association's so-called "Principles of Acceptability," adopted by it to support development of "a unified position" regarding to all third party dental plans,[341] included the following provisions:

> 3. X-rays should *not* be provided to any patient or third party.
>
> a. X-rays are part of the dentist's legal health records of the patient.
> b. *X-rays alone cannot give a third party sufficient information for diagnosis or treatment planning.* (emphasis added)
> c. X-rays in the hands of a third party are another interference with the dentist-patient relationship and the dentist's professional judgment.[342]

133. In a "missionary" talk in early 1976, Dr. Dan Rohn, a leading figure during all stages of the boycott, explained the so-called "Indiana Plan" to the American Academy of Dental Practice Administration:

> The one principle that causes the most problem is our stand on non-submission of radiographs to a third party. . . . First of all we believe the reading of radiographs and making decisions which would alter a treatment is diagnosing dental disease. This is practicing dentistry. It should be done [94] only by the attending dentist and not from radiographs alone. I am sure none of you here would be presumptious enough to look at a set of radiographs alone and make or alter another doctor's treatment plan. You would want more information than just the radiographs. Any good, responsible dentist would.[343]

134. Following organization of IFD in 1976, a committee set out to draft its "work rules" and among those considered was one expressly opposing dentists' submission of X-rays to insurers. The single "work rule" ultimately adopted, in April 1977, however, referred to non-submission of X-rays only obliquely. It did so by proscribing diagnosis and treatment planning without the assistance of all diagnostic aids,

[341] CX 39A.
[342] CX 39A.
[343] CX 394F-G.

a narrative history and all clinical findings. It then placed on each dentist "moral and legal responsibility" for making sure that his patient's condition not be determined "for any purpose" without just such a "complete examination":

> Proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids with a history and with all clinical findings. No one facet of this process is now, or ever has been, recognized by the profession as a substitute for the complete process. To represent otherwise would subject the patient to sub-standard care.
>
> The patient's dentist, therefore, has a moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose without the benefit of a complete examination which takes into account all the elements described (above).[344]

135. During this trial there was a great deal of expert testimony by practicing dentists, (mostly IFD leaders), insurance company executives (with dental **[95]** expertise) and two academic experts (from Indiana University) concerning what X-rays can and cannot be expected to reveal for dental diagnostic purposes. The testimony on this complex question is summarized for easy reference in Paragraphs 136 through 139.

136. Complaint Counsel adduced evidence of a good many things which a radiograph *can* reveal to a dentist and much of this went unchallenged by either Respondent or Intervenor. For example, there was no denial of expert testimony by Metropolitan's sometime Director of Dental Relations that an X-ray will show a dental consultant tooth decay, an abscess, bone loss around the teeth or pathology in the bone itself.[345] Nor was there any dissent from testimony by the same witness that an X-ray can even spot dental caries that may not be evidenced through clinical examination.[346] An X-ray will also show, he explained, if there are teeth in opposition to teeth that are present (so as to permit determination of whether the teeth have functioning counterparts).[347] He testified, too, that an X-ray will show such physiological attributes as bone structure around the teeth, affecting degree of mobility (backward and forward movement in the teeth) based on bone support.[348] [Another of Complaint Counsel's experts testified that an X-ray does not show a patient's physiological condition but added that this was of slight importance with respect to the mechani-

[344] CX 537A. *See also* CX 542B, the back of IFD's standard claim form for patients, with the "Work Rule" printed thereon.

[345] Tr 1436–37. But *cf.* Dr. Janzarik at Tr 2548 to the effect that an X-ray may not show decay which is masked by a large silver filling.

[346] Tr 1515.

[347] Tr 1514–15.

[348] Tr 1514.

cal restoration of teeth.][349]

137. One area in which there *was* some conflict of testimony concerns occlusion (the striking angle of the teeth). On one hand an Aetna expert asserted that an X-ray can demonstrate the incidence of traumatic occlusion, depending on the scope of the X-ray, the quality with which it is taken and the angle with which it is taken.[350] **[96]** However, Respondent's current President testified that an X-ray alone will *not* show an occlusion of the teeth and that a diagnosis of occlusion cannot be made from an X-ray, with or without a claim form.[351] Similarly, the Aetna expert testified that an X-ray can show the hardness of a patient's bite (*i.e.,* the pressure exerted) from the amount of wear in the occlusal surfaces[352] but another expert put it differently: an X-ray, he said, does *not* show the hardness of a person's bite, unless there is abrasion on the teeth (and even then X-rays may be indecisive about the wear of the cusps).[353] The same Aetna expert testified that such abnormal habits of a patient as pipe-smoking may be shown by an X-ray;[354] but pipe-smoking is *not* one of the conditions to which an X-ray will point, according to one of Respondent's leaders.[355]

138. There were certain areas where there seems to be no serious argument that an X-ray alone will *not* do the job. Respondent's current President asserted without challenge that even a trained dentist can *not* determine the choice of restorative material just by looking at an X-ray, because that choice varies with how well the patient takes care of his teeth, which, in turn, affects how long the restorative material will last.[356] Another of Respondent's leaders testified that he would refuse to try and determine from looking at an X-ray what choice of restorative material he should use in his treatment, because "there are so many extenuating conditions."[357]

139. Finally and not too surprisingly, there was general agreement that X-rays will *not* show the patient's mental condition,[358] which is said to have considerable **[97]** bearing on the treatment.[359] Respondent's current President elaborated on this as follows:

(A)s you are working with a patient, you are more aware of what they will tolerate and

[349] Tr 323.
[350] Tr 1322.
[351] Tr 2548–49. *Accord:* Tr 324.
[352] Tr 1322–23.
[353] Tr 325.
[354] Tr 11323–24.
[355] Tr 2448.
[356] Tr 2547.
[357] Tr 2447.
[358] Tr 326, 1324–25, 1514, 2549.
[359] Tr 1324–25.

what they will not tolerate and what they will take care of and what they will not take care of.

A typical example is a patient who is missing tooth [*sic*] on each side of one arch and what I would say is the best treatment is two unilateral bridges. All right. Cheaper but adequate is a partial. But if this patient is the type that does not really give a darn about his teeth and yet he does brush them—I mean he just doesn't take meticulous care—the partial is a food trap. . . . The least (costly?) adequate or alternate mode would be a partial and yet it would destroy the dentition of the patient's mouth.[360]

140. In addition to all the technical testimony about what a dental X-ray will or will not reveal, there was conclusionary testimony as to whether a dental diagnosis should ever be based solely on X-rays (or any other diagnostic aid). On this question the experts—on all sides—seemed to agree that an X-ray or other diagnostic aid alone is not enough for an accurate diagnosis.

141. Professor Kasle, for the Intervenor, testified that no one diagnostic aid is sufficient in and of itself for a proper diagnosis and more specifically that "a radiograph can't stand alone."[361] A Connecticut General dental consultant said he would have to have additional information beside X-rays before he would invoke alternate treatment: "I cannot make a complete determination from an [98] X-ray."[362] A top Aetna dentist/executive agreed: "I would say that diagnosis should not be made on the basis of X-rays alone."[363]

142. To say, however, that diagnoses should not rest on X-rays alone does not take the argument very far. How much else is required for a sound determination in the circumstances of a particular case? Respondent's current President not surprisingly would require the use of all diagnostic aids for all determinations:

. . . . [S]omeone who is to determine what is right and what is wrong in each particular case must see everything clinically [physically], health history, X-rays and the patient.[364]

143. Literally applied, such a rule, requiring physical examinations in all cases, would seem to put the insurers out of the dental health care insurance business in Indiana because it is "very, very costly" and "unpractical" to perform a physical examination on each patient[365] and examinations are "not a practical solution."[366]

144. More realistic was the opinion of the head of IU's Dentistry

[360] Tr 2549–50. But *cf.* the testimony of a California Dental Service expert who conceded that X-rays will not show a mental condition and agreed that oral hygiene is very important but "would not necessarily prescribe a different type of filling material because the oral hygiene of the patient was questionable." Tr 326–27.

[361] Tr 2716–17.

[362] Tr 947.

[363] Tr 1302.

[364] Tr 2546. The head of Indiana University's Radiology Department was even more expansive (Tr 2716).

[365] Tr 341–42, 924–925, 978, 1221, 1232, 1383–1384, 1457; CX 303E, CX 316.

[366] Tr 1220.

School, who would utilize every diagnostic aid available[367] but agreed that it would probably be "proper" to base a diagnosis on a claim form and an X-ray or a claim form and a narrative history, if necessary.[368]

145. An even more pragmatic approach is that of the pioneer California Dental Service, whose long-time head [**99**] testified here that in "the great majority" of California's more expensive cases[369] his organization makes its decision on the basis of X-rays but will make a physical examination if a question about the determination is raised by the attending dentist.[370] Only in less than 1 percent of its predetermination (more expensive) cases does California Dental Service find it necessary to supplement X-rays with physical examination.[371]

146. Unfortunately the record here is substantially deficient in evidence as to just what supplementation of X-rays for diagnoses is the usual practice of the dental health care insurers serving Indiana. That deficiency is plainly the fault of Respondent, which has the burden of establishing that its restraint of such insurers' trade is reasonable.

147. Not knowing how the public health and safety are being affected by the insurers practices here, we have no health/safety factor to weigh in the balance against the plain anticompetitive and anti-consumer tendencies of Respondent's "group boycott". Our condemnation of the second paragraph of Respondent's vigilante "Work Rule"[372] and Respondent's application thereof stands.

148. This disposition of the health/safety question makes it unnecessary to deal with Respondent's constant assumption that an insurer's change (generally downward)[373] in benefit payments translates automatically into a comparable change in treatment plan. The record contains no satisfactory evidence that this is usual. Even if it were, we would have difficulty tracing the change in treatment plan to the change in benefit payments. The patient is always free to make up the difference in cost [**100**] between what his own dentist recommends and what the insurer's consultant will approve. The patient is thus an independent, intervening force breaking the asserted chain of causation between disallowance of a claim and change in treatment plan.

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[367] Tr 2692.

[368] Tr 2690. This testimony was based on a rephrased question and it is not clear on which basis the question was answered.

[369] A $100 minimum predetermination guide is apparently usual, although inflation seems to be driving the minimum up to $125 (Tr 393, 534–36, 563–64, 980).

[370] Tr 339–41, 354.

[371] Tr 339–41.

[372] CX 537A.

[373] There is no argument that most changes are reductions. An Aetna survey in its Ft. Wayne regional office, for example, found 20 alternate course reductions in 21 referrals (Tr 1351–52).

K. *State Action*

149. Respondent's chief defense here (and the reason for the State of Indiana's intervention) concerns "state action". The tenth amendment to the Federal Constitution reserves to individual states all powers neither expressly nor impliedly[374] granted to the Federal government and the Supreme Court has recently interpreted the 10th Amendment quite favorably to the states.[375] Many years ago, in *Parker* v. *Brown,* 317 U.S. 341 (1943) the Supreme Court held that the Sherman Act was never intended by Congress to reach state action regulating intrastate commerce, even though such regulation be anticompetitive in character and thus would be in violation of the federal law against unreasonable restraints of trade if it had been undertaken by a private person (and had the requisite effect on inter-state commerce).

150. A recent trilogy of cases has tightened up the doctrine of *Parker* v. *Brown* in certain respects, notably by insistence on finding *real* action by a state or private action really required by a state before honoring such a defense.[376] While the basic rule of *Parker* v. *Brown* —that real state regulation of commerce is not a restraint of trade under the Sherman Act—remains intact, nonetheless the genuineness of the state action or state requirement of private action relied on has become a prime issue whenever such a defense is raised.

151. In this case Respondent and Intervenor rely on the "state action" doctrine to defend Respondent's boycott [101] of insurers as a way of enforcing the Indiana law against unlicensed practice of "dentistry". On this branch of the case no attack is made on alleged over-reliance by insurers' dental consultants on X-rays for diagnosis; the attack is rather entirely on the use of lay screening by X-rays. The theory seems to be that insurers break the Indiana law against unlicensed practice of dentistry when they employ unlicensed paraprofessionals to make "diagnoses" from radiographs, even if only for the limited preliminary purpose of "screening", to determine which, if any, X-rays need be sent to an insurance company dental expert for definitive review. That alleged offense, the argument goes, plus Indiana's law against aiding and abetting the commission of such an offense requires Respondent and its dental vigilantes to boycott the

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[374] The *implication* of powers to the Federal government was one of the major advances of the Constitution over the Articles of Confederation, which, in a similar context, reserved to the states all powers not *expressly* granted to the Federal government. The tenth amendment uses neither the word "express" nor the word "implied". Corwin, E. S., *The Constitution of the United States of America,* 88th Cong., 1st Sess., Senate Document No. 39 (1964), page 1035.

[375] *National League of Cities* v. *Usery.,* 426 U.S. 833 (1976).

[376] *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978).

insurers. We must accordingly review Indiana's "state action" on the subject.

152. In 1913 the Indiana Dental Law made it unlawful for any person to "practice dentistry" in Indiana who had not first obtained a license to do so, as provided in the same statute. Indiana Code 25–14–1–1 (in IX 4). The statute provided that the Governor appoint from a list of practicing dentists, submitted by the trustees of the Indiana Dental Association, a nine-man state board of dental examiners. I.C. 25–14–1–2 *et seq.* (in IX 4). This state board of dental examiners was charged by the same statute with "administering and enforcing the laws pertaining to the practice of dentistry and of dental hygiene" and it was given the power and authority "to make, promulgate, adopt and enforce rules and regulations for the administration and enforcement of this act, in the manner provided by the law regarding the adoption of rules and regulations by a state agency". I.C. 24–14–1–13 (in IX 4). The "manner provided by the law" etc. is now set forth in I.C. 4–22–2–2(a) of the Indiana Administrative Procedure Act as follows:

> All rules,[377] regulations and other documents containing a statement of policy, other than official opinions of the Attorney General, which the issuing agency[378] intends to have the effect or force of law [102] but which are not promulgated, approved and filed as rules in conformity with the provisions of this chapter, shall be invalid, void and of no force or effect after the first day of January, 1978.[379] (footnotes added).

153. Section 4–22–2–5 similarly provides, in pertinent part, that "[n]o such rule shall be effective until after compliance with the provisions of this act." The decisional law of Indiana has long been fully in accord. Thus, statements and bulletins issued by state agencies that are not properly promulgated as rules have no legal effect. *Indiana State Personnel Board* v. *Jackson,* 192 N.E.2d 740 (Ind. 1963); *State* v. *Edwards,* 89 N.E.2d 443 (Ind. 1950). The act requires that before any rule or regulation having the force of law is adopted, there be notice and a hearing in which interested persons can participate and that the rules be approved by the Governor and Attorney General

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[377] The statutory definition of a "rule" includes "any rule, regulation, standard, classification, procedure, or requirement of any agency . . . interpreting, supplementing or implementing any statute." Ind. Code Ann. § 4–22–2–3 (Supp. 1979) (Burns).

[378] The statutory definition of an "agency" includes any board or department of the State of Indiana. Ind. Code Ann. § 4–22–2–3 (Supp. 1979) (Burns).

[379] Ind. Code Ann. § 4–22–2–2(a) (Supp. 1979) (Burns), as set forth above, replaced the following language:

> All rules and regulations heretofore made, adopted or promulgated by any agency of the State of Indiana which were not promulgated, approved and filed in conformity with the provisions of chapter 213 of the Acts of 1943, shall be invalid, void and of no force or effect after the first day of January, 1946.

within a specified time period and filed with the Secretary of State.[380]

154. The Indiana Dental Law gives the State Board of Dental Examiners the right to place the holder of a license on probation or suspend or revoke his license for any of numerous specified causes, such as obtaining a license by fraud, conviction of a felony, "unprofessional conduct" (of many specified kinds) or failing, neglecting or refusing to obey and comply with any Indiana statute in regard to the practice of dentistry or using or employing in his practice the services of anyone who is violating any provisions of any Indiana statutes relating to dentistry. I.C. 24–14–1–19 (in IX 4).

155. In addition to possessing this power to suspend **[103]** or revoke existing licenses for specified causes the Board of Dental Examiners, along with the Attorney General, local prosecuting attorneys and citizens of the same county, is empowered by the Indiana Dental Law to obtain an injunction against the practice of dentistry "as herein defined" by anyone not possessing a valid license to do so. I.C. 25–14–1–14 (in IX 4). The definition of "practicing dentistry" within the meaning of the Dental Law appears in I.C. 25–14–1–23, which includes, among several other tests, the following:

> Any person . . . who . . . offers to diagnose or professes to diagnose or treats or professes to treat any of the lesions or diseases of the human oral cavity, teeth, gums, maxillary or mandibular structures. . . .

156. It is worth noting that this provision does not purport to deal with "diagnosis", as distinguished from an "offer" or "profession" to diagnose and a fairly good argument might, perhaps, be made that the statute was never intended to reach mere diagnosis, absent a holding out as a dentist. However, this section of the law also contains a proviso which does use the word "diagnosis" without qualification:

> Provided that this section shall not apply to those procedures which a legally licensed and practicing dentist may delegate to competent office personnel as to which procedures the dentist exercises direct supervision and full responsibility, which procedures shall in no event include either (1) those procedures which require professional judgment and skill such as diagnosis and treatment planning. . . . I.C. 25–14–1–23 (in IX 4).

Accordingly, we must conclude that the "practice of dentistry", as defined in I.C. 25–14–1–23, was meant to include the simple act of "diagnosis", whether or not accompanied by an offer or profession to diagnose.

157. On the other hand, the same proviso would seem to imply that diagnosis is a non-delegable function of dentistry *only* insofar as it is one of those procedures "which require professional judgment and

[380] I.C. 4–22–2–4, 5 (Burns Supp. 1979).

skill." That leaves open the question whether the very limited kind of "diagnosis" made by a paraprofessional in screening X-rays to determine whether or not to refer a particular radiograph to an expert should be deemed "diagnosis" within the meaning of the law against unlicensed practice of dentistry. **[104]**

158. Whatever the practice in former years, insurers serving Indiana now generally allow lay employees to view X-rays only for the limited purpose of deciding whether there is a problem that seems to call for expert judgment, *i.e.,* whether to rely on the attending dentist's opinion as a basis for payment or to send the X-rays to the insurer's own experts for a second opinion.

159. A paraprofessional may process a "simple form. . . . the more common procedures," which represent the overwhelming portion of claims.[381] Since, however, the paraprofessional can only allow—*i.e.,* cannot reduce or deny—the claim, it is hard to see how an insured can ever be prejudiced in such case.[382]

160. If, however, there is a question a paraprofessional cannot handle, he or she has no authority to deny or reduce the claim but must send it on to a company dentist for expert review.[383]

161. A concrete example of how another major insurer serving Indiana deals with this problem is found in a claims guide for internal company use.[384] It recognizes that "it requires a professional consultant to read and interpret X-rays for other than the most evident conditions" (specifying several)[385] and thereafter lays down the general rule as stated above:

> A lay processor or analyst, upon review of X-rays, can approve benefits BUT . . . . NO PERSON OTHER THAN A CONSULTANT CAN RECOMMEND THAT BENEFITS BE REDUCED OR DENIED.[386] **[105]**

Association et al v. *Commonwealth of Pennsylvania Insurance Department,* Pa. Cmwlth., 398 A.2d 729 (1979), the Commonwealth Court held that a dental health care insurer would not violate Pennsylvania's statute against unauthorized practice of dentistry by having a lay clerk make a "first review" (*i.e.,* a *screening*) of radiographs to determine whether they satisfy the insurer's standards. The applicable statute provided that "a person engages in the 'Practice of Dentistry' within the meaning of this act who diagnoses . . . any disease, pain or injury . . . of the human teeth, jaws or associated structures . . . (etc.)" 63 P.S. Section 121. The testimony was "clear" that if a clerk

[381] Tr 913–914, 1320.
[382] Tr 2704–05, 2725–26.
[383] Tr 1416.
[384] IX 500A–C.
[385] IX 500B (*in camera*).
[386] IX 500C (*in camera*).

decides that the radiographs do not satisfy Blue Shield standards, the radiographs are then forwarded to a dental examiner for a "final" determination. The Court concluded:

> Appellants have not indicated to us, and we are unable to ascertain for ourselves, any aspect of the practice of dentistry as defined in Section 2 (*i.e.*, 63 P.S. § 120) which is violated when a clerk makes the first review of radiographs to determine whether they satisfy Blue Shield standards. page 734.

The Supreme Court of Indiana seems no more likely than the Commonwealth Court of Pennsylvania to find that the word "diagnosis" applies to the mere screening of X-rays by paraprofessionals for subsequent analysis by experts who possess "professional judgment and skill." Accordingly on this record there is probably no violation of the law against unlicensed practice of dentistry to be "aided and abetted" by sending X-rays to insurers.

163. Even, however, if we were one hundred percent wrong about whether an insurer's paraprofessionals "practice dentistry" within the meaning of the Indiana Dental Act, merely by screening X-rays and even if Respondent's dentists were found to be aiding and abetting the insurer's offense *individually* just by sending them X-rays on request, nevertheless the result of this case would be the same. Nothing in the Dental Act suggests either expressly or by implication that dentists are permitted—much less *required*—to organize a group boycott to help enforce the law—the only offense with which Respondent is charged here.

164. The Act is quite clear about how and under what circumstances public force is to be mobilized to deal with the unlicensed practice of dentistry. We have already referred to the Dental Act's provision for obtaining an injunction against the unlicensed practice of dentistry. I.C. 25–14–1–14 (in IX 4). It is true that such an **[106]** injunction may be sought not only by the public prosecutors and the Board of Dental Examiners but by "any citizen of any county" where the unlicensed dentistry is alleged to be carried on. A citizen's injunction suit, however, is a horse of a different color from a privately organized vigilante movement.

165. The Indiana injunction statute specifically provides that such an action shall be maintained "in accordance with the laws of the State of Indiana governing injunctions," I.C. 25–14–1–14 (in IX 4) with all the fair-trial and rational-proof safeguards inherent in judicial procedure. In such an action the methods used by insurers must be proved by reliable evidence and a reviewable decision must be carefully reached as to whether the precise facts shown really amount to "practicing dentistry." It would be hard to believe that the Indiana legislature—after setting up such procedural safeguards for an ac-

cused—intended to allow a dental vigilante group to enforce the law on its own by way of an organized boycott, free from all the restraints that civilization has built into judicial injunction procedure.

166. The contrast between law enforcement and vigilantism is even more striking in the case of criminal proceedings against unlicensed practice of dentistry and/or "aiders and abettors" thereof, which is provided in the Indiana Dental Act, I.C. 25–14–1–25. Is it even conceivable that the organizers of a private boycott would or could apply the presumption of innocence, the reasonable doubt rule and the criminal law's many other refinements to the random mass of unsubstantiated facts and rumors on which vigilantes commonly act? Vigilantism may have played a useful role in the pioneer West when no other kind of law enforcement was yet available—but the lights of civilization are now presumably brighter than that. The Indiana Dental Law makes clear provision for *public* action to stop the unlicensed practice of dentistry. It does not contemplate and certainly does not *require* concerted private action of any kind.

167. When we look beyond Indiana's statutes on the subject of practicing dentistry without a license, we find a few purported administrative actions (by the Board of Dental Examiners and the Department of Insurance) to which Respondent and Intervenor point as filling the statutory gap. The effort of Respondent and Intervenor to find valid administrative action of this sort is strenuous but not convincing. We now review these efforts.

168. The first evidence on which Respondent and Intervenor rely is an "Unofficial Advisory Letter" dated 3/14/74 from then Deputy Attorney General C.C. Plopper to the [107] President of the Indiana Board of Dental Examiners.[387] It was written in response to a request from the Board to know whether unauthorized practice of dentistry is involved in "clerks employed by third party insurance companies, checking radiographs submitted by a dentist to determine if the proposed treatment by the dentist should be authorized." Plopper replied:

> No clerk, who would be a layman, could possess the knowledge required to make such a diagnosis from radiographs. Neither would such a clerk have the knowledge to determine whether a proposed treatment would be proper, so that it would fall within authorized bounds.
>
> It is my opinion that only a dentist should review radiographs and proposed treatments for third party insurance companies and the use of clerks to make such reviews would be improper and should be proscribed.[388]

169. The Plopper letter shortly thereafter became the basis for a

[387] IX 5.
[388] IX 5.

general statement of policy by the Board of Dental Examiners[389] and later in the year (10/9/74) the Board advised at least one dental health insurer (Aetna) that it was "taking this (the Plopper) position."[390] Some four years later, after the X-ray boycott had resulted in the bringing of this complaint, the Board sent a letter to all Indiana dentists reviewing I.C. 25–14–1–23's definition of "practicing dentistry", citing the relevant criminal law, including I.C. 25–14–1–25 (unlicensed dental practice a misdemeanor) and I.C. 335–41–2–4 (aiding and abetting commission of a crime), and reaffirming (almost verbatim) the gospel according to Plopper (with reference to submitting dental X-rays to dental health insurers).[391] There is no evidence, however, that the Attorney General of Indiana or anyone else has ever charged —let alone convicted—any layman of practicing dentistry without a **[108]** license on the ground that such person screened X-rays for a dental health care insurer.

170. Plopper himself recognized that "the views expressed herein [*i.e.*, in his 'unofficial advisory letter' of 3/14/74] are those of the writer and are not to be considered to be the opinion of the Attorney General of Indiana nor a precedent of the Attorney General's office."[392] Plainly Mr. Plopper's personal opinion has something less than binding force and constitutes something less than "state action".

171. The policy statements of the State Board of Dental Examiners that resulted from Plopper's letter fare little better. Such policy statements are "invalid, void and of no force or effect unless promulgated, approved and filed as rules" in conformity with the provisions of the State Administrative Procedure Act, I.C. 4–22–2–2(a). *See also* I.C. 4–22–2–5. That statute requires notice and hearing in which interested persons can participate; approval of the rules by the Governor and Attorney General; and filing with the Secretary of State. I.C. 4–22–2–4 and 5.

172. However, the Board of Dental Examiners never held any hearings, issued any rules or regulations, undertook any administrative proceedings or brought—or even recommended—any enforcement suits concerning submission of X-rays to and review of X-rays by insurers.[393] While it is perhaps understandable that Respondent's allies on the Board of Dental Examiners would prefer merely to issue policy statements rather than hold hearings where insurers, customers and customers' employees would all have to be heard, mere policy statements by individuals in public office are not "state action".

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[389] IX 6.

[390] IX 90A.

[391] IX 9, IX 9A, IX 9B.

[392] IX 5. Only "official" opinions of the Attorney General have the force of law under Section 4–22–2–2 of the Indiana Administrative Procedure Act.

[393] Tr 2229, 2281, 2291–93, 2778.

173. Neither Plopper's "unofficial advisory opinion" nor the Board of Dental Examiners' policy statements based thereon had any standing at law; until recently neither even had application to the factual situation that has emerged from the evidence here. Plopper expressly assumed a practice by insurers of having clerks check X-rays "to **[109]** determine if the proposed treatment[394] by the dentist should be authorized." This evidence here shows, however, that this is *not* the prevailing practice among insurers of dental health serving Indiana. Such insurers' paraprofessionals read X-rays only to screen out the large number which need not be referred to one of the insurer's "dental consultants" for expert examination and determination.[395] Even if Plopper's opinion had had legal standing insofar as applied to a lay diagnosis for treatment or payment, it had no application to a lay determination merely as to whether an expert opinion was called for. Both the Plopper letter and the Board's policy statements are thus immaterial here.

174. We turn now to the Indiana Department of Insurance, which has plenary authority over any unfair claim practices of insurance companies operating in that state.[396] State Insurance Commissioner H. P. Hudson, head of the Insurance Department during recent years, put in a good deal of time and effort trying to mediate between the IDA/IFD dentists and the dental health insurers serving Indiana. The high point of his efforts at mediation was reached during the first half of 1976, when he planned and promoted a nine-months pilot program for submission of X-rays by dentists to insurers under compromise conditions, the whole to be monitored by his office.[397] The insurers agreed to try the pilot program[398] and Hudson then made a personal appeal to the House of Delegates of IDA on 5/1/75[399] but the dentists refused to compromise.[400]

175. Mediation, however, is very different from state action. Indeed, since it merely encourages the parties to settle a dispute voluntarily it could well be thought of **[110]** as the opposite of state action. As for evidence of Hudson's participation in the dispute in a governmental capacity—hearing and deciding insurance claim practice cases or otherwise—such evidence is close to zero.

176. Typical is the Indiana Insurance Department's "Bulletin 37" on the subject of "Dental X-rays",[401] issued in early or mid-September

[394] We trust that Plopper understood he was giving an opinion on authorization of payment, not authorization of treatment.

[395] *See* Pars. 158–162, above.

[396] CX 810E.

[397] CX 810B.

[398] CX 810C.

[399] *See* Hudson's speech to IDA outlining his proposal in CX 810 *et seq.*

[400] CX 425.

[401] IX 167.

1979[402] on the eve of hearings in this case. Bulletin 37 first recited previous advice to insurance companies offering dental insurance plans that the practice of allowing personnel not licensed as dentists to "evaluate" dental X-rays is a violation of the insurance laws of Indiana governing Unfair Trade Practices and the Indiana Dental Licensing Law (I.C. 25–14–1–1 *et seq.*) It further recited that "allegations are being made that certain insurance companies are currently utilizing personnel not licensed as dentists to evaluate dental X-rays. Over Commissioner Hudson's signature, Bulletin 37 then made this pronouncement:

> The Department reiterates and reaffirms its position opposing such practice. Evidence brought to my attention reflecting this conduct will result in an unfair trade practice hearing against the company so charged.[403]

177. It appears, however, that the Commissioner's bark is notably worse than his bite, as cross-examination of his assistant and legal adviser developed at the trial here:

> Q. (W)hat status does a bulletin issued by the Department of Insurance have?
> A. A bulletin is the Department's position on whatever the subject matter is of that bulletin and the Department takes the stance that that bulletin will be enforced by the Department. It does not carry the weight of either statute or regulation but [it] is an interpretation that the Department makes with regard to the subject matter. [111]
> Q. It has no force of law, is that correct?
> A. That's correct.
> Q. And this bulletin was not issued pursuant to—no notice to the public to comment on this bulletin or hearings were held prior to its issuance, was there?
> A. That's correct.[404]

178. One other Insurance Department/Dental Board policy statement deserves most careful consideration. Hearings in this matter began on 10/2/79. On that date, in response to an urgent request by the Attorney General's office and the Board of Dental Examiners to issue a strong pronouncement for the FTC proceeding.[405] Insurance Commissioner Hudson and Dr. Paul Stephens, long member of the IDA/IFD X-ray conspiracy and by 1979 President of the all-dentist Board of Dental Examiners, together signed a letter addressed to "all Indiana-Licensed Insurers" which was sent to all Indiana-licensed

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[402] Tr 2774–75.

[403] IX 167.

[404] Tr 2777.

[405] A Board member informed the Insurance Department: "The Attorney General's office is most anxious for these documents to be mailed before October 2 as they want to use them for exhibits in the FTC case" (CX 826A). He reported to the Attorney General's office: "Hopefully the Department of Insurance and the Board will get copies in the mail to their respective charges by October 2. At any rate the letter could be dated September 24" (CX 827).

dentists, too.[406] This policy statement re-hashed the Plopper opinion, recited that "the use of radiographs in any diagnostic capacity whatsoever requires judgment and skill reserved only for licensed dentists," explained how a dentist's submission of X-rays to insurers "aids and abets" the unlicensed practice of dentistry and warned of possible criminal prosecution for such a violation. Thus far there was nothing very new in the letter.

179. However, there was enclosed with the letter a [112] form affidavit[407] to be sent by dentists to insurers and returned with a sworn statement by the insurer that the dentist's X-rays have been *"screened, read, used for 'benefit determination' and/or any other diagnostic procedure"* only by specified licensed dentists. Obtaining such an affidavit was recommended to protect the dentist from criminal prosecution as an "aider and abettor" of the insurer.[408] The theory of this affidavit was expressly stated in the text, as follows:

> Should an insurance carrier be subsequently suspected of using unlicensed personnel to perform any but the clerical operations of identifying the source or disposition of films, that carrier will be subject to investigation and potential prosecution. *Operations termed "benefit determination", screening, reading, identifying teeth or any such procedures are deemed to be reserved for licensed dentists only.* (emphasis added)[409]

180. Note that this last-minute effort to aid and abet Respondent's "state action" defense for the first time sought to bring mere *screening* of X-rays within the target area of the Indiana Insurance Department/Board of Dental Examiners attack. That the letter went out in response to a plea by Intervenor's Counsel to help win this case[410] would alone cast grave doubt on its significance as evidence of "state action". Be that as it may, under cross-examination Commissioner Hudson's legal advisor conceded "that (the Hudson/Stephens joint letter) *does not have the force of law."* (emphasis added)[411] Under the provisions of Indiana's little APA cited above, he could hardly have said anything else for it is obvious that Respondent and its allies on the Dental Board and in the Insurance Department were hard pressed enough just to get out the purported evidence of "state action" wanted by Respondent's counsel for this hearing without going through [113] the lengthy hearings and public debate required to make a real rule in Indiana.

181. The testimony of the same official confirmed that the Insurance Department has never held hearings or promulgated formal

[406] IX 167 and IX 167A.
[407] IX 167B through IX 167D.
[408] IX 167C.
[409] IX 167A.
[410] CX 828.
[411] Tr 2778.

rules or regulations with respect to the question of submission of radiographs to insurance companies.[412] Indeed, he explained, the Department has never been engaged in any legal proceeding over the issue of radiographs[413] nor have any of the unfair trade practice actions it has brought against insurance companies in the past related to any matter pending here.[414]

182. As a matter of fact in August 1978 Respondent itself was so dissatisfied with what it then considered the substantial failure of the State of Indiana and its Board of Dental Examiners to employ the unauthorized practice provisions of the State's Dental Practice Act the Respondent wanted that it (IFD) brought suit against both the State and the Board in the U.S. District Court for the Southern District of Indiana (Civil No. IP 78–498–C) for $25 million damages.[415]

183. However, in December 1978 a deal was apparently made for Respondent to drop its suit if the State Board of Dental Examiners would agree to intervene in this (FTC) matter.[416] On 12/20/78 the District Court, Holder, J., granted Respondent's motion to dismiss its own suit and the following day the State filed its petition to intervene here.[417]

184. To summarize the "state action" question, the State of Indiana has long required dentists to be licensed but the Dental Practice Act specifies nothing as to whether paraprofessionals should be forbidden either to read X-rays or to screen them for reference to experts. [114]

185. Occasional assertions of some state-officials to the effect that X-rays should not be read by laymen for any purpose and, during trial here, to the effect that X-rays should not even be screened by laymen all turn out to lack official standing to define an offense. Without a primary offense of practicing dentistry without a license there can, of course, be no secondary offense of "aiding and abetting" the primary offense. Manifestly Indiana dental health care insurers are not required to conform their business practices to the mere personal opinions of Dr. Stephens or Commissioner Hudson any more than to the "unofficial advisory opinions" of Mr. Plopper.

L. *Collateral Estoppel*

187. A principal contention of Respondent and Intervenor is that we are not permitted to make our own assessment of the "state action" defense, as we have just done. Such consideration is foreclosed under the well-known doctrine of "collateral estoppel", the argument runs,

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412 Tr 2778.
413 Tr 2778.
414 Tr 2782.
415 CX 508A, D, E, F.
416 CX 824.
417 *See* Summary of Proceeding above, pp. 4, 5, 6.

by the prior findings and conclusions of a U.S. District Judge in a suit brought by the State of Indiana and its Board of Dental Examiners to compel this Commission to permit them to intervene in this matter.

188. Under the traditional "mutuality" requirement of the collateral estoppel doctrine Respondent probably could not invoke that doctrine here because Respondent was not a party to the intervention suit.[418] In any event, however, the doctrine of collateral estoppel does not apply for another reason. The findings which Respondent and Intervenor urge us to carry over from the suit to compel allowance of intervention were not necessary or essential to the judgment of intervention, a universally accepted prerequisite to application of collateral estoppel.

189. The most recent restatement of the law by the **[115]** American Law Institute provides:

§ 68. *Issue preclusion—General Rule*

When an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment* (emphasis added), the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[419]

Comment h thereto elaborates on the portion underlined above:

Determinations not essential to the judgment. If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded (emphasis added). Such determinations have the characteristics of dicta and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.[420]

190. The rule that a finding unnecessary to a judgment does not raise a collateral estoppel has been unquestioned federal law for over a century. The Supreme Court held in *Russell* v. *Place,* 94 U.S. 606, 608–09 (1876) **[116]** that:

to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—*that is, that the verdict in the suit could not have been rendered without deciding that matter* (emphasis added) or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

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[418] *Restatement of Judgments* (1942) § 93. But *cf. Restatement (2d) of Judgments,* § 88 (Tent. Draft No. 2, 1975) eliminating the mutuality requirement for application of collateral estoppel. *See Haize* v. *Hanover Ins. Co.,* 536 F.2d 576, 578, fn. 1 (1976).

[419] *Restatement of Judgments,* 2d (Tent. Draft No. 4, 4/15/77) § 68.

[420] *Ibid.*

191. In order to apply this law to the relevant facts it is necessary to review briefly the record here and the nature and history of the extraneous lawsuit where the findings in question were made. Following issuance of this complaint against Respondent Indiana Federation of Dentists in the Fall of 1978, the State of Indiana and its Board of Dental Examiners, by its Attorney General, on 12/29/78 petitioned to intervene here to insure an adequate presentation of Indiana's position on the "state action" question.

192. The Commission's rule concerning intervention (Section 3.14) provides little light on when intervention is justified. It provides:

§ 3.14 Intervention.—Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper. [117]

193. The Administrative Law Judge, citing the tests laid down in *Firestone Tire & Rubber Company,* D. 8818, 77 F.T.C. 1666 (1970), on 1/5/79 denied the petition to intervene (although welcoming any *amicus curiae* briefs). He did so primarily because no showing had been made that Respondent would not adequately present the State's position and there was thus no countervailing consideration to weigh against the likely evil effects of complicating and lengthening the proceeding by permitting intervention.

194. On 1/19/79 the State of Indiana applied to the Commission for review of the Judge's order but on 2/5/79 the Commission, too, denied intervention, primarily for failure to demonstrate how the State would likely improve on the showing to be made by Respondent. On 3/12/79 the Commission denied a petition for reconsideration and soon thereafter the would-be intervenor turned to the Federal courts.

195. On 5/23/79 the State of Indiana and the Indiana State Board of Dental Examiners filed in the U.S. District Court for the Southern District of Indiana, Indianapolis Division, a complaint (with motion for preliminary injunction) against the United States of America and this Commission, which was then docketed as Civil No. IP–453–C.[421] Reciting the history of Indiana's unsuccessful attempts to intervene in this case and pleading various facts relative to the "state action" defense here, the State's complaint ended by asserting (Par. 46) that

[421] IX 1000Z–25 *et seq.*

the State of Indiana was "entitled to intervention as of right in FTC Docket 9118 pursuant to its sovereign right to regulate the dental profession within the State."

196. The prayer for relief which followed, however, did not limit itself to *intervention* but sought, alternatively, an order *dismissing the FTC Complaint for lack of jurisdiction:*

> Wherefore, the State of Indiana and the Indiana State Board of Dental Examiners respectfully request that the Court issue an Order:
>
> a) enjoining the F.T.C. from proceeding [118] further, in any way, with the prosecution of docket 9118 until the resolution of the instant complaint;
> b) finding that the F.T.C. lacks jurisdiction to proceed with docket 9118, and order that the cause be dismissed; or, in the alternative,
> c) declaring that the State of Indiana was wrongfully denied its intervention of right in docket 9118, and order that full intervention be granted immediately; and
> d) for all other just and proper relief.[422]

197. On 5/23/79 the United States and this Commission filed a motion (with supporting brief and proposed findings and conclusion) to dismiss this complaint or, in the alternative, for summary judgment on the grounds that (1) the District Court lacked jurisdiction over the subject matter; (2) that the complaint failed to state a claim; and (3) that there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law.[423] On 7/10/79 the District Judge set 7/19/79 for a hearing and argument on the *State's* motion for a preliminary injunction but when counsel appeared the District Judge expressed distaste for preliminary injunctions and stated his preference to proceed immediately to trial on the merits under F.R.C.P. Rule 65, to which proposal all counsel agreed. The Judge had Commission counsel orally admit or deny each allegation of Indiana's complaint, then proceeded to hold an immediate hearing on the merits, which consisted of submission of a few affidavits and general agreement that a few others could be submitted within a few days. The case was thereupon submitted for decision. [The entire record of the hearing, which occupies only 57 pages, is in evidence here for easy reference.][424] **[119]**

199. What followed is complicated. The District Judge had no hesitation in denying without opinion the Commission's motion to dismiss Indiana's complaint or in the alternative for summary judgment and did so on 8/17/79.[425] On the same date the District Judge made find-

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[422] IX 1000XX.
[423] IX 1000Z–11.
[424] *See* CX 855A through CX 855Z–35 (hearing transcript) and IX 1000G (Court's entry for 7/19/79).
[425] IX 1000Z–4.

ings and conclusions generally taken from Indiana's proposals,[426] and then by mistake entered *both* of the two judgments which had been proposed by Indiana as *alternatives*.[427]

200. One judgment signed by the District Judge ordered the Commission to "immediately grant plaintiff State of Indiana's petition for leave to intervene in the Federal Trade Commission proceeding."[428] The second judgment signed by the District Judge ordered the Commission to "immediately cease exercising jurisdiction and dismiss the Federal Trade Commission proceeding."[429] It is plain, as recognized in Indiana's original prayer for "alternative" relief,[430] that it would be inconsistent to order *both* the dismissal of the proceeding and the intervention of Indiana at the same time.

201. The mistake in entering both proposed judgments was promptly recognized and corrected *sua sponte* by the District Judge on 8/23/79 by adding the following entry concerning the 8/17/79 judgment of dismissal for lack of jurisdiction:

> The above Judgment is vacated as improvidently entered in the belief it was a copy of a Judgment entered the same date. The Judgment permitting intervention of August 17, 1979 is in full force and [120] effect.[431]

202. This left it that the only surviving *judgment* was the one compelling intervention. However, it also left a number of *findings and conclusions* proposed by Indiana and adopted by the District Judge which would tend to support a dismissal but would be unnecessary if not positively irrelevant to the intervention order. Accordingly, on 9/7/79 the Commission filed a motion to vacate certain findings and conclusions *nunc pro tunc* to conform to the modified judgment.[432]

203. The *findings of fact* by the District Judge which the Commission wanted vacated were specified to be as follows:

> (11) Indiana Code 25–14–1–23 and 25 define the criminal act of practicing dentistry without a license, which includes the diagnosing or reading of X-rays.[433]
>
> * * * * * * *
>
> (18) Under the mandate of Indiana Law, Indiana dentists are prohibited from submitting their dental X-rays to third party insurers who employ "dental consultants", who

[426] IX 1000Z–5 through IX 1000Z–10.
[427] IX 1000Y.
[428] IX 1000U.
[429] IX 1000V.
[430] IX 1000XX.
[431] IX 1000Y.
[432] IX 1000H–J.
[433] IX 1000Z–7.

are not licensed to practice dentistry to read or diagnose the X-rays.[434]

204. The *conclusions of law* by the District Judge which the Commission wanted vacated were specified to be as follows: [121]

(3) The order proposed by the Secretary of the F.T.C. would infringe on the State's right to regulate the practice of dentistry within the State under its police powers by the Tenth Amendment to the Constitution of the United States (citing cases).[435]

* * * * * * *

(6) The F.T.C. is proceeding beyond its jurisdiction in attempting to regulate the practice of dentistry in the State of Indiana and should be enjoined from doing so (citing cases).[436]

205. The merest reading of these particular findings and conclusions—all of them going to the merits of the case here—makes it plain that they were originally proposed to support the demanded dismissal of this case on "jurisdictional" grounds and are quite irrelevant or immaterial to the demand for intervention, which turns entirely on procedural considerations and which Judge Holder had already found supportable in his Conclusion of Law #5.[437] The rest of the District Judge's conclusions are clearly *unnecessary* to the only judgment (intervention) rendered by him and accordingly should have been vacated when the other (mistaken) judgment of dismissal was vacated.

206. However, the Commission's motion to vacate was *not* granted. In an entry on 10/18/79 the District Judge [122] made an explanatory statement, which is reproduced here as Figures 8A–B,[438] to the effect that the Commission "has jurisdiction over certain of the matters and of the Indiana licensed doctors before it" but asserted on the other hand that "that jurisdiction is limited by the exclusive rights of the State of Indiana under the police power to protect the health of the citizens of Indiana and oversee the dental profession." "It is this right," he explained, "that the defendants are enjoined from invading. . . ." (*See* Figures 8A and 8B).

207. The rest of the statement is difficult to follow and seems little more than a general expression of sympathy for the State's position on the merits here. While closing with an assurance that "the Federal Trade Commission is unhampered by this Court's ruling of August 17,

[434] IX 1000Z–9.

[435] IX 1000Z–10.

[436] IX 1000Z–10.

[437] "The State meets the requirements for intervention as established by the F.T.C. in the *Firestone Tire & Rubber Company*, Dkt. No. 8818, 77 F.T.C. 1666, 1669 (1970) in that the issues the State seeks to raise cannot be properly raised and argued by the current parties to the proceeding and only minimal additional cost and time will be required by its intervention." (Conclusion of Law #5).

[438] IX 1000E–F.

1979 in fulfilling its mission in Docket No. 9118" he nonetheless added: "The findings of fact as found and the conclusions of law thereon are necessary for the relief sought." How findings on the merits of this lawsuit could be necessary to a judgment in that lawsuit merely allowing intervention here the District Judge did not attempt to explain and we cannot convince ourselves that such could be the case.

208. Respondent and Intervenor now take the position that the District Judge's express statement that his findings were necessary to his judgment is dispositive. But this is contrary both to authority and common sense. Thus a judge's characterization of his judgment as made on the merits is not binding when objective analysis indicates otherwise:

> Although the court which renders the judgment states that it is "on the merits," this characterization is not always conclusive in the forum or on other courts which are required to give full faith and credit to the judgment. Nor for purposes of *Erie-Tompkins* is the characterization by the state courts of its judgment as procedural or jurisdictional binding upon the federal courts sitting in that state, which are required to determine independently what is **[123]** "substantive" for purposes of the *Erie* doctrine. 1B *Moore's Federal Practice,* ¶ 0.409[7] at 1041–1042 (2d Ed., 1974).

> It is well settled . . . that *what has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues* presented for decision. *Adams* v. *Pearson,* 411 Ill. 431, 104 NE 2d 267, 270 (1952) (emphasis added).

> The intention of the court to make a determination on the merits may be important *but if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial.* The words "with prejudice" add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court. *Goddard* v. *Security Title Ins. and Guarantee Co.,* 83 P.2d 24, 28 (Cal., 1938) (emphasis added).

209. Such cases merely reflect common sense: no judicial *ipse dixit* can make black white. There being no serious doubt that the District Judge's findings and conclusions about the merits of this case were not *necessary* to his only *judgment* (allowing intervention), the case is clearly governed by the rule of Section 68 of the Restatement of Judgments (2d) denying collateral estoppel where a determination is "not essential to the judgment." Our conclusions above with reference to the doctrine of "state action" and its inapplicability here thus correctly stand on their own two feet, unshackled by the District Judge's expressions of feeling about the merits here.

* * * * * * *

The findings of fact proposed by Complaint Counsel, Respondent and the State of Indiana are all granted insofar as consistent with this Initial Decision and denied insofar as inconsistent herewith. [124]

Figure 8A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA; and INDIANA STATE BOARD OF DENTAL EXAMINERS vs. THE UNITED STATES OF AMERICA; FEDERAL TRADE COMMISSION; and MICHAEL PERTSCHUK, Chairman, PAUL RAND DIXON, ELIZABETH HANFORD DOLE, DAVID A. CLANTON, and ROBERT PITOFSKY, Members of Federal Trade Commission	No. IP 79-453-C

ENTRY

The matters of the defendants' September 7, 1979 motion to vacate nunc pro tunc certain findings of fact and conclusions of law to conform to modified judgment as amended on October 9, 1979 to show belated service of motion on plaintiffs' counsel, and plaintiffs' motion to strike came on for the Court's ruling.

[illegible] the matter and being duly advised in the premises, now finds that defendants' motion should be and is hereby DENIED and plaintiffs' motion to strike is MOOTED by such ruling.

Simultaneously herewith the Court if filing a CORRECTED judgment entry of August 17, 1979.

It is apparent that the Federal Trade Commission has jurisdiction over certain of the matters and of the Indiana licensed dentists before it. On the other hand that jurisdiction is limited by the exclusive rights of the State of Indiana under the police power to protect the health of the citizens of Indiana [illegible] It is this right that the defendants are enjoined from invading and impressing upon the

State of Indiana's citizens of an agreed course of conduct between a group of dentists and the Federal Trade Commission in which the State of Indiana had no input. The agreement between the Federal Trade Commission and one group of Indiana dentists no doubt will be in issue in the hearing of the complaint in Docket No. 9118. Indiana's ability to prosecute a dentist would be greatly hampered by such a course of agreed action. The power of the purse of the payers acting through unlicensed, incompetent personnel could be the ultimate deciding factor in the diagnosis of an Indiana citizen's need for dental care. It should be clear that the mission of the Federal Trade Commission is not limited to the complainant payers' and Indiana's licensed dentists points of view but also respect the rights of the sovereign State of Indiana and thus avoid complainant payers' and/or Indiana's licensed dentists use of the Federal Trade Commission proceeding to circumvent the State of Indiana's policing the dental profession in the interest of the health of its five million citizens. The Federal Trade Commission is unhampered by this Court's ruling of August 17, 1979 in fulfilling its mission in Docket No. 9118. The findings of facts as found and the conclusions of law thereon are necessary for the relief sought.

Dated this 18 day of October, 1979.

Cale J. Holder, Judge, United States District Court Southern District of Indiana

[126] IV. Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the subject matter of this complaint against unfair methods of competition and unfair acts and practices, by virtue of the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

2. The Commission has personal jurisdiction over Respondent unincorporated association and its members by virtue of the delivery of a copy of the complaint to its office at 2403 Raible Ave., Anderson, Indiana, on 11/13/78, pursuant to Rule § 4.4(a)(iii).

3. Although Respondent is an unincorporated association, for purposes of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, it is a "corporation" organized to carry on business for the profit of its members.

4. Respondent is not in the business of insurance and even if the targets of its organized boycott be deemed in the business of insurance, the McCarran-Ferguson Act's exemption of the insurance business from the antitrust laws expressly excludes application of the exemption to a boycott of the business. 15 U.S.C. 1012, 1013(b).

5. Respondent has billed itself as a labor union or labor organization and thus exempt from the strictures of the antitrust laws under Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29, but it is not such a labor organization and its activities are not exempt from antitrust scrutiny.

6. While the businesses of dentists that make up this association are not in interstate commerce, the practices charged in this complaint tend to have an adverse effect on the businesses of dental health care insurers serving Indiana, which are in interstate commerce.

7. Respondent was formed in 1976 to join and continue a concerted refusal by many dentists in Indiana to submit radiographs (X-rays) to dental health insurers either automatically or on request.

8. The concerted refusal of Respondent and its co-conspirators to supply X-rays to dental health care insurers on request is *per se* an unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, and an unfair method of competition and an unfair act and practice under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. [127]

9. Even if such a concerted refusal were not an unreasonable restraint of trade *per se,* there is no proof on this record of any procompetitive effect and no sufficient proof of any beneficial or effect on health/safety to outweigh the plainly anticompetitive and anti-consumer effects of the IDA/IFD group boycott of dental health care insurers.

10. Respondent and its co-conspirators have also threatened to pre-

vent and to some extent have prevented said insurers from getting access to the services of dentist members except on Respondent's terms, as an ancillary weapon in the struggle over submission of X-rays.

11. Respondent's continuing effort to organize refusals by dentists to supply X-rays requested by insurers is volunteered activity and has never been required by the State of Indiana. Respondent has no "state action" defense here.

12. The findings and conclusions of the U.S. District Court for the Southern District of Indiana, Holder, J., in *State of Indiana* v. *Pertschuk, et al.* (Civ. IP 79–453–C) raise no collateral estoppel here and do not operate to deprive this Commission of jurisdiction over this matter.

13. Respondent has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

14. The relief to be granted here will be in the public interest.

V. Relief

The relief contemplated in the notice attached to the complaint is recited verbatim in the Summary of Proceedings above.[439] However, Complaint Counsel, as is entirely proper, now recommend following the somewhat different IDA consent order (Attachment A to "Complaint Counsel's Brief Supporting Conclusions of Law") and point to testimony that "this (IDA) order has been effective against IDA."[440] Even Respondent concedes that "all (insurance) companies apparently experienced a substantial increase (in X-ray submissions) in late 1978 after a consent order was agreed [128] to between the IDA and the FTC and the IDA changed its (X-ray submission) policy."[441] However, Respondent's concession may be undue; the transcript references cited in support refer only to "an increase", not to "a substantial increase."[442] Whether the IDA consent order has really freed up Indiana X-rays significantly is not quite as clear as counsel on both sides would make out.

In any event it is our responsibility to decide what seems most likely to put an end to the violation found, *F.T.C.* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1962) with the least dislocation possible, *F.T.C.* v. *All-Luminum Products, Inc.,* 63 F.T.C. 1268, 1279 (1963) and to that purpose we have broad discretion, *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611 (1946), so long as the remedy is reasonably related to the offense, *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S.

[439] *See* Page 4 above.
[440] Tr 922; Tr 1282.
[441] RPF #12.
[442] Tr 919, 922, 1282.

470, 473 (1952). We shall now take up the several operative paragraphs of the IDA consent order one by one.

Paragraph IIA of the proposed order goes to the heart of the case, prohibiting IFD from intentionally organizing dentists to refuse to submit X-rays or other diagnostic aids to third-party insurers. Since the principal finding of this proceeding is that Respondent has done precisely what Paragraph IIA(1) would forbid, there can be no objection of substance to this proposal.

Paragraph IIA of Complaint Counsel's proposed order also contains a second sentence which would direct IFD to cease and desist from organizing dentists to "refuse to deal in any particular way with any one or more third-party payers (*i.e.*, insurers)". This concern to forestall other boycotts for other purposes by members of an association already found to be boycott-prone is entirely reasonable, although we have revised the wording somewhat in our own order.

The Administrative Law Judge has made one important change in Par. IIA. The proposed order assumes that IFD will remain in existence as an unincorporated association. The Judge sees no good reason for keeping this association in existence as such. Not an ordinary professional association carrying on the usual gamut of professional activities and services like IDA, IFD was conceived simply **[129]** as a "labor union" *front* for those IDA members (particularly those living in the Anderson, Lafayette and Ft. Wayne areas) who were most concerned with keeping IDA's boycott of dental health insurers alive, even after antitrust prosecution began to loom as a real threat. With our decision forbidding the members of IFD to continue their insurer-boycott, the reason for IFD's being ceases and its continued existence could serve only as a constant temptation to use the organizational shell for the old, meretricious purpose or something like it.

Dissolution of an *ad hoc* organization designed as a vehicle to carry on a venture unlawful under the antitrust laws is the oldest known form of antitrust divestiture. Dissolution of the holding company thru which a monopoly had been effected was the very heart of the relief in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911). Accordingly, the very first provision of our order here will be to order dissolution of IFD within six months and a report to the Commission not more than a month later. In this situation our several cease and desist orders will be directed to the members of IFD rather than to the unincorporated association which has served as the vehicle for their unlawful activities and will therefore shortly cease to exist under our order. It is, of course, well established that the Commission can issue orders which are binding on unnamed officers, agents, representatives and employees. *Western Fruit Growers Sales Co.* v. *F.T.C.,* 322 F.2d 67 (9 Cir., 1963), *cert. denied,* 376 U.S. 907 (1964); *Mandel Bros.*

v. *F.T.C.*, 254 F.2d 18, 22 (7 Cir., 1958), *rev'd on other grounds*, 359 U.S. 385 (1959). *A fortiori* as to members of an unincorporated association sued in the association's name.

Paragraph IIB of Complaint Counsel's proposed order would forbid IFD to compel or coerce insurers to change any provision of a dental health care benefits program. This situation seems covered by the provision of our own order [(2–(2))] just discussed. Accordingly, we omit recommended Paragraph IIB.

Paragraph IIC would apparently prohibit activity by Respondent which has either of two purposes:

1. inducing patients to choose dentists who do *not* "cooperate" with dental health insurers; or
2. influencing patients to choose dentists on the basis of how such dentists do not "cooperate" with insurers.

The provision seems aimed at consumer-level boycotts but it **[130]** is abstruse and unclear. The key word "cooperate", which could mean many things, is not defined and its presence would make the provision quite difficult to enforce. Moreover, there would usually seem to be little need for this kind of auxiliary prohibition if the association be dissolved and the members be forbidden to pursue the insurer-boycott which is the gist of this case.

Moreover, the only[443] cited evidence in this record that IFD has ever tried to mount anything like a boycott at the consumer level is a single incident in the latter part of 1977 and early 1978 involving "Arnie's Pizza King" in Lafayette, Indiana.[444] When the Lafayette chapter heard that "Arnie" was posting a list of "accepted" and "non-accepted" dentists in Lafayette for its employees' reference, IFD's Dr. Fontaine either was deputized or volunteered (the record is not clear) to "discuss removing the list with the owner."[445] Some months later IFD's *Union News* reported with reference to an unidentified restaurant in Lafayette (which we assume to be "Arnie's") that "it was good to hear that a simple phone call from the IFD remedied the situation."[446] The record does not show whether Dr. Fontaine in his phone call engaged in any threats of economic or other pressure or simply relied on a personal friendship or took some other approach unrelated to a boycott threat; nor do we have any evidence of why "Arnie" took down his list.

It seems to the Administrative Law Judge that a broad prohibition

[443] We are at a loss to understand how Complaint Counsel's reference to the Anderson chapter's monopoly of orthodontists and oral surgeons in that area could bear on this particular provision and have accordingly disregarded Complaint Counsel's reference to that fact.

[444] CX 544A; CX 547.

[445] CX 544A; CX 547.

[446] CX 563B.

of consumer-level boycotts such as would be forbidden by recommended Par. IIC should not be based on a single, isolated minor incident (about which we really know very little.) Accordingly we exclude recommended Par. IIC or any equivalent from our order.

The last two provisions of Complaint Counsel's proposed order (Paragraphs II–D and II–E) might well be called the [131] "Pierce clauses" for both seem to be aimed at practices involving, among others, Dr. Pierce, the dentist nominated by IDA to be a consultant for CG but who always remained loyal to IDA and IFD. Paragraph II–D of Complaint Counsel's proposed order would prohibit IFD from trying to induce insurers to select certain dentists as dental consultants for any reason but their expertise, while Paragraph II–E would prohibit IFD from trying to influence dental consultants to render opinions which they do not really believe. Complaint Counsel find need for these provisions firstly because the evidence shows IFD "pressuring" CG to make reluctant use of their candidate (Dr. Pierce) to review claims in the Anderson area and secondly because Dr. Pierce was, as we have said, a strong IFD supporter who hardly ever requested other dentists' X-rays or even visited local dentists' offices to review X-rays there for CG.

The half dozen dental consultants involved here were the product of a compromise between IFD and CG when the GM-UAW plan started and the compromise somehow kept CG operating in Indiana despite the formidable opposition of the IDA/IFD conspiracy. For various reasons the idea of having IDA nominate these experts to CG (to decide difficult benefit questions) happened to serve the interests of both parties. This case was not brought to test Dr. Pierce's faithfulness or faithlessness. Efforts to deal with such minor, incidental matters in a Commission order dedicated to freeing up a substantial business beset by an unlawful boycott serve only to confuse the point of the exercise and, accordingly, we decline to be side-tracked into putting "Pierce clauses" in our own order.

Order

The Administrative Law Judge now finds that issuance of the following Order will serve the public interest:

1. All members of the unincorporated association and component chapters known as the Indiana Federation of Dentists shall henceforth cease and desist from associating themselves together in that organization and the officers of the association shall take all steps necessary to effect its complete dissolution within six months from

the date of this order, reporting the details of such dissolution to this [132] Commission in writing within one month thereafter.

2. All persons who have at any time since 8/24/76 been members of the Indiana Federation of Dentists shall henceforth cease and desist from expressly or impliedly agreeing among themselves or with other dentists to:

(1) refuse collectively to submit patients' dental radiographs (or any other diagnostic aids) to dental health insurers who, with the patients' consents, request such radiographs; or

(2) refuse collectively to deal with anyone in order to force their will on the target of such boycott.

3. Respondent will forthwith mail a copy of this decision and order by registered mail to every member of the association at his last known address.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The practice of dentistry is not the selling of salt, aluminum, or tobacco. Dentists provide personal health services, not fungible goods. Moreover, the activities of professional associations contribute to the high level of health care in this country, just as trade associations help improve the quality of goods in many industries. But dentistry *is* a business, and the business practices of dentists are subject to the same antitrust laws as are the business practices of manufacturers, jobbers, and retailers. Conspiracies and boycotts which substantially limit competition are methods of self-regulation that violate the very essence of our antitrust law. In this case, respondent joined and assumed leadership of a conspiracy of Indiana dentists to withhold patient x-rays from dental insurers, thereby frustrating their cost-containment programs. We conclude that its methods were unacceptable and must be forsaken. [2]

I. Summary

The complaint in this case was issued on October 18, 1978, charging that the Indiana Federation of Dentists ("IFD") violated Section 5 of the Federal Trade Commission Act[1] by engaging in a concerted course of conduct with its members to eliminate or hinder competition among dentists with respect to their cooperation with the implementation of certain kinds of dental insurance programs. The complaint alleged that the conduct of IFD and its members was a continuation

[1] 15 U.S.C. 45(a)(1)(1976).

of the concerted action engaged in by the Indiana Dental Association ("IDA"), its members, and its component societies since at least 1961.[2]

Respondent IFD is an unincorporated association of Indiana dentists formed in August 1976. (CX 477B–C; CX 22A)[3] Membership in IFD is open to any licensed dentist who endorses IFD's purposes and those of the American Federation of Physicians and Dentists, with which IFD is affiliated and to which each IFD [3] member must belong. (CX 13C) IFD's membership is concentrated in and around the three localities of its chapters: Madison County, Daleville, and Middletown (Chapter #1) (CX 14A); Tippecanoe, Clinton, White, and Carroll Counties (Chapter #2) (CX 15A); and Allen County (Chapter #3) (CX 16A). As of February 1979, IFD had 84 dues paying members and 8 former members. (CX 12; ID 3) Its affairs are conducted by an eight-member executive committee, which includes a president, vice-president, secretary, and treasurer. (CX 13G–H–I) IDA is a "constituent society" of the American Dental Association; most Indiana dentists belong to IDA. (ID 14)

The gravamen of the complaint is that IDA, its component societies, and their members in agreement among themselves and with IFD and its members, through the distribution of guidelines, the conduct of meetings, workshops, pledge campaigns and other actions, engaged in a course of conduct to eliminate, prevent, or hinder competition among Indiana dentists with respect to their cooperation with third party payers administering dental health care insurance programs containing "predetermination" and "least expensive adequate course of treatment" provisions.[4] The [4] complaint alleges that IFD has

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[2] IDA was named as a co-conspirator but not as a respondent. At the time the Commission issued the complaint against IFD, it accepted provisionally a consent order from IDA. 43 Fed. Reg. 53767 (1978). That order was finally accepted in 1979. 93 F.T.C. 392.

[3] The following abbreviations will be used in this opinion:

ID	– Initial Decision, Finding Number
ID, p.	– Initial Decision, Page Number
Tr	– Transcript of Testimony, Page Number
CAB	– Complaint Counsel's Answering Brief, Page Number
RAB	– Respondent's Appeal Brief, Page Number
IAB	– Intervenor's Brief, Page Number
CX	– Complaint Counsel's Exhibit Number
RX	– Respondent's Exhibit Number
IX	– Intervenor's Exhibit Number

[4] "Least expensive adequate course of treatment" provisions limit coverage to the least expensive treatment that is commonly accepted as providing good dental care. The more widely used name in recent years for this dental program feature is "alternative benefits" coverage. Programs that offer alternative benefits coverage usually allow dentists to submit treatment plans for approval before the treatment is provided, if it will cost more than a given minimum. Insurance companies encourage dentists to submit non-emergency expensive treatments for "predetermination," so that the treatment can be discussed and, ideally, disagreement between the dentist and the company as to what would constitute good care for the patient can be resolved before the treatment is provided. Whether or not agreement is reached, predetermination of benefits at least advises the patient and dentist—before treatment is provided—how much the insurance company will pay for treatment. While predetermination of benefits is encouraged, it is not *required* by either Connecticut General or Aetna (Tr 779, 1106) or, as far as we can discern from the record, by any other company offering a dental plan in Indiana.

(footnote cont'd)

sought to hinder competition among dentists by encouraging its members to adopt a uniform course of conduct in dealing with such third-party payers and by urging payers, purchasers, and beneficiaries of dental health care plans to eliminate provisions of such plans that it finds unacceptable. Such conduct allegedly restrained competition among dentists, affected the cost of dental health care services in Indiana, deprived consumers of the benefits of cost-containment programs and second opinions, and limited the opportunity of consumers to select dentists who cooperate with dental health care benefits programs. At least, it is alleged, the conduct had the tendency or capacity to have such effects. The complaint alleges that these activities constitute unfair methods of competition and unfair acts or practices in violation of Section 5. [5]

Following the trial[5] the Administrative Law Judge ("ALJ") concluded that the Commission had jurisdiction over the respondent's practices since: (1) the respondent is a "corporation" within the meaning of Section 4 of the FTC Act (ID 4,5); (2) it is not a labor organization within the meaning of the exemptions of Sections 6 and 20 of the Clayton Act (15 U.S.C. 17 and 29 U.S.C. 52) (ID 6); (3) neither it nor the "insurers" with whom its members have refused to cooperate are engaged in the business of insurance within the meaning of the McCarran-Ferguson Act (15 U.S.C. 1012, 1013(b)) and, in any event, that Act does not exempt from the federal antitrust laws agreements to boycott (ID 7); and (4) respondent's conduct was a "substantial" restraint on interstate commerce. (ID 9–11) With respect to the merits, the ALJ found that respondent IFD was formed for the purpose of adopting or continuing IDA's conspiracy to keep Indiana dentists from submitting x-rays to dental insurers (ID 104) and that widespread compliance by IFD members with the IDA-IFD boycott policy was achieved. (ID 114) Additionally, the ALJ found that IFD and its co-conspirators threatened to prevent and to some extent prevented dental insurers from obtaining access to the services of dentists as dental consultants[6] except on [6] respondent's terms (ID, p. 5), *i.e.*, dental insurers encountered difficulty in hiring licensed Indiana dentists to review dental claims and those hired encountered heavy resistance. (*See, e.g.*, ID 45) The ALJ rejected respondent's state action defense (ID 149–185) and held that IFD's conduct constituted an unfair method of competition and an unfair practice in or affecting

Dental insurers commonly request copies of pretreatment (*i.e.*, diagnostic) patient x-rays to use in evaluating dental treatments under alternative benefits coverage, particularly in evaluating more expensive treatments. If the dentist refuses to provide such x-rays, a claim for reimbursement may be denied entirely. (*See, e.g.*, ID 44)

[5] The trial began on October 2, 1979, and continued through November 1. The record, which includes approximately 440 exhibits and 2,785 pages of transcript from the hearings, was closed on November 16, 1979.

[6] "Dental consultants" refers to those dentists hired by dental insurers for the specific purpose of reviewing dental claims where there is a question as to the least expensive adequate course of treatment.

commerce in violation of Section 5 of the FTC Act. (ID 120–148; ID, p. 127)

The ALJ issued an order that, *inter alia,* provides for the dissolution of respondent within six months from entry of a final order and prohibits all dentists who have been members of IFD from agreeing to refuse collectively to submit consenting patients' x-rays to dental insurers.

Respondent argues on appeal that its alleged conduct did not have a substantial effect on interstate commerce and is also exempt from Commission scrutiny by virtue of the state action doctrine and collateral estoppel. Respondent claims further that its actions do not support a finding of liability under either a *per se* or rule of reason analysis, that no conspiracy was established, and that the proceeding is not in the public interest. Finally, with respect to the ALJ's order for dissolution, IFD maintains that the order is overly broad and not reasonably related to the alleged offense. [7]

II. Commerce

Respondent's sole challenge to the Commission's jurisdiction is its argument that: (1) there is insufficient evidence to establish the required nexus between IFD's conduct to prevent the submission of x-rays to dental care insurers and the interstate commerce of the insurers, and (2) the record does not show that the alleged conduct of IFD had an effect on the interstate commerce of the insurers. (RAB 56–57) Contrary to respondent's assertions, the ALJ concluded, as do we, that there is ample evidence to support the Commission's assertion of jurisdiction in this case.[7]

There is no serious question that the businesses of dental health care insurers, such as Aetna Life and Casualty Insurance Company and Connecticut General Life Insurance, that have been the target of IFD and IDA's activities are in interstate commerce. *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). Even the insurance contracts themselves that gave rise to IFD and IDA's challenged conduct were interstate in character, as they were not mere personal contracts but agreements between national employers (*e.g.,* International Harvester and General Motors) and national insurance companies. Moreover, it is clear that the volume of business conducted by the companies in Indiana was substantial. (*See* ID 11 and ID, p. 24.) Thus, the only real issue is whether respondent's [8] conduct has had the necessary connection with and effect on such interstate commerce.

[7] Since only the interstate commerce challenge to jurisdiction was raised in respondent's post-trial brief, we regard its other jurisdictional defenses to have been abandoned.

Assuming *arguendo* that the provision of dental care services is wholly intrastate in character, it is nevertheless an integral element in the implementation of dental health care insurance plans. Moreover, unlike the restraint on title search services in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), that only indirectly affected the interstate financing of mortgages, any restraint on the cooperation of dental care providers with dental health care insurers can *directly* affect the business of those insurers. Indeed, respondent's conduct was purposely directed toward those businesses.

The ALJ concluded, based upon his reading of *McLain* v. *Real Estate Board of New Orleans, Inc.,* 444 U.S. 232 (1980), that the Commission's jurisdiction was sufficiently established by the fact that respondent's boycott was *designed* to affect adversely interstate commerce.[8] While such a finding alone may be **[9]** adequate, the record in this case shows that respondent's activities did in fact "substantially and adversely" affect interstate commerce. *Hospital Bldg. Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, 743 (1976).[9] **[10]**

Since, as we will discuss below, IFD continued a conspiracy initiated by IDA, we begin by examining the effect of IDA's activities. A May 1972 edition of IDA's Manual on Group Funded Dental Care Programs declares in its "Principles for Determining the Acceptability of Plans for the Group Purchase of Dental Care" that group dental care plans "must not *require* the dentist to submit radiographs to a third party." (CX 47E) The Manual's model "To All My Patients" letter includes the following:

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[8] The *McLain* decision dealt with an alleged conspiracy to fix commission rates for real estate brokers. The ALJ relied on the following language in that opinion:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases.

444 U.S. at 242–43. He apparently read this passage to support the conclusion that if the legitimate dental practices of respondent's individual members affected interstate commerce, it was unnecessary to show that the IDA-IFD conspiracy itself affected interstate commerce.

The ALJ is not alone in concluding that the holding of *McLain* was that "it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violation, affected interstate commerce." *Western Waste Service Systems* v. *Universal Waste Control,* 616 F.2d 1094, 1097 (9th Cir.), *cert. denied,* 449 U.S. 869 (1980). *Also, Bain* v. *Henderson,* 621 F.2d 959, 961 (9th Cir. 1980); *Classen* v. *Weller,* 516 F. Supp. 1243, 1244 (N.D. Cal. 1981). *Contra, Crane* v. *Intermountain Health Care, Inc.,* 637 F.2d 715 (10th Cir. 1981). However, it is unnecessary for us to decide here whether this is the correct reading of *McLain,* or whether the rule set forth in that case is applicable here, since the more stringent jurisdictional standards of *Goldfarb* and *Hospital Bldg. Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, 743 (1976), discussed above, can be satisfied.

[9] This and other cases decided under Section 1 of the Sherman Act have analyzed that Act to cover practices that "substantially and adversely" affect interstate commerce. Since Section 5 of the FTC Act governs practices "in or affecting commerce," practices within the Sherman Act's jurisdiction are necessarily also subject to the FTC Act. However, practices that do not meet the test for Sherman Act jurisdiction may nevertheless be subject to the FTC Act.

Dental radiographs are a part of the dentist's legal health records. They are available for valid review by a qualified representative(s) of your insurance company *in this office.* Radiographs will not be submitted to third parties for their use in determination of benefits (e.g., least expensive adequate procedure, or optional course of treatment) because a determination of an adequate treatment plan can only be made after a knowledge of the following:

A. Complete patient evaluation.
B. Radiographs.
C. Additional diagnostic procedures as required.

(CX 47G) (emphasis added)
In 1973 IDA sought written pledges of support for its Principles of Acceptability from its members throughout Indiana. (Its membership in 1974 included about 85 to 88 percent of the state's dentists. (CX 303E)) The organization found the project to be a "tremendous success," with 100 percent support in some local societies. (CX 138; ID 27–32) In 1975, a survey of the actual practices of 2,000 of IDA's members, with 1,342 responding, showed that of 811 members receiving requests for x-rays from insurers, only 133 were providing them. (ID 33–34) [11]

With respect to two particular dental insurers, Aetna and Connecticut General ("CG"), the record shows that: (1) at IDA's urging, many of its members, particularly in areas where IDA's organization was strongest, refused to provide x-rays for review; (2) through its leadership IDA as an organization pressured the companies not to request x-rays; and (3) the companies were forced to modify their normal practices in processing insurance claims in response to this concerted action in Indiana. This resulted in some cases in claims not being paid to insured patients or in their being delayed, and it also increased the companies' costs in administering their programs. (ID 39–80)

At its first annual meeting on April 24, 1977, IFD adopted a "Work Rule" declaring that a dentist "has a moral and legal responsibility to not allow a determination of his patients [sic] condition to be made *for any purpose,* without the benefit of a *complete examination* * * * ." (CX 537A) (emphasis added) The new organization designed and distributed to its members a form letter for denying requests from insurers for x-rays (CX 586A–B; CX 556A–B, F; CX 563C–D), which was widely used. (ID 114) (*See* ID, p. 85 for an illustrative letter.) After seeking x-rays from one Madison County member in early 1977, the manager of the CG office in Indianapolis concluded, on the basis of the reaction he received from IFD's representatives, that CG would have to continue its policy of excepting Madison County dentists from its normal procedures in processing dental claims. (ID 116, 117; Tr 870–878) The representative of another insurer, Metropolitan Life Insurance Company of New York, testified that his company [12] continued

to request x-rays from IFD members and, when refused, did not pay benefits to the insured patient. (Tr 1614–15)

From this and other evidence reviewed in the Initial Decision, the Commission concludes that respondent's activities have had a substantial effect on interstate commerce in the provision of dental health care benefits programs. (*See, particularly,* ID 11 and Figure 1, ID p. 24.)

III. Conspiracy

Respondent does not contest the ALJ's finding that IDA conspired with its members to boycott dental insurers. However, respondent asserts the absence of sufficient evidence in the record to sustain the ALJ's finding that IFD members conspired among themselves and with IDA to withhold dental x-rays from dental care insurers. We conclude, however, that the preponderance of evidence in the record supports such a finding.

The record here is rich with evidence from which a "reasonable inference" can be drawn of the adoption and continuation of IDA's activities by respondent and its members. *Eastern States Retail Lumber Dealers' Ass'n* v. *United States,* 234 U.S. 600 (1914); *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939). *See also United States* v. *Cadillac Overall Supply Co.,* 568 F.2d 1078, 1087 (5th Cir. 1978), *cert. denied,* 437 U.S. 903 (1978); *United States* v. *Consolidated Packaging Corp.,* 575 F.2d 117, 126 (7th Cir. 1978). Contrary to respondent's characterization of IFD as "a breakaway group of dentists who were dissatisfied with IDA policy" (RAB 58), the record shows that a major impetus for the formation of IFD was a **[13]** growing apprehension that IDA's activities could be challenged successfully under the antitrust laws, coupled with a misimpression that a "dentists' union" would be immune from such action. (ID 87–98) Some IFD leaders also felt that a union could be more effective than IDA in dealing with dental insurers, and that a union was a "more suitable vehicle" than IDA for such activities. (ID 102) However, their intent was not to set off in a new direction, but rather to continue the same activities through a new organizational form. In addition to evidence of this fact found by the ALJ in statements of IDA and IFD leaders before and immediately after the formation of IFD, there is evidence in the record that well after IFD was created, its leaders continued to view its mandate as one of continuing the IDA conspiracy. (*E.g.,* CX 540A, Tr 1715–16) The record contains evidence not only of the declaration of common objectives by the leaders of both organizations, but also of cooperation between members and leaders of both organizations (*e.g.,* CX 486A–C, CX 490A–B, CX 492A, CX 543A) and leader-

ship by the same persons in both organizations in the formulation of policies for dealing with third party insurers. (ID 15 and Fig. 2, ID 16 and 25) Hence, we conclude that the record supports a finding of conspiracy between IDA and IFD, notwithstanding IDA's gradual withdrawal during the period that IFD was being organized. [14]

With regard to the issue of whether respondent conspired with its members to withhold x-rays, the record is replete with evidence of adherence to common objectives and of coordinated activities by respondent and its members. First of all, a major formal objective of IFD, as stated in its Constitution and by-laws, is "[t]o represent dentists in all socio-economic matters, negotiations and grievances with employers, third, and fourth parties or any group that is involved in financing or delivery of dental care." (CX 13A) Subsequent to IFD's formation, the IFD Work Rule was adopted at an annual meeting of the full membership. (CX 537A) By direction of the Executive Board (CX 541A), the Work Rule was printed on the back of a claim form created by IFD for its members. (CX 542A–B) This form was used by members refusing to submit x-rays to dental insurers. (CX 680–682; CX 713; CX 718) IFD members also used a common form letter to deny requests for x-rays. (CX 586A–B; ID 114 and ID p. 85) On at least two occasions, IFD's President responded on behalf of another IFD member in refusing to submit x-rays. (CX 652, 653; CX 654, 655) On another occasion, a request to an IFD member resulted in a call from IFD's Vice President; this call further resulted in a meeting between IFD representatives and a manager of CG, after which CG refrained from making further requests of Madison County IFD members for x-rays. (ID 117) IFD's President also represented its members in a meeting with another dental insurer and the union and Madison County employer whose dental plan was administered by that company. (ID 118) He stated that IFD members would not submit x-rays. (Tr 1625) [15] IFD's policy to withhold x-rays was also expressed by its representatives in meetings with other employers and unions. (*E.g.,* Tr 1665–1667, CX 544A.) Hence, we conclude that there is ample evidence in the record to support a conspiracy among members of IFD and between IFD and its members.

IV. Section 5

Respondent is alleged to have engaged in unfair methods of competition by conspiring with certain Indiana dentists to refuse to provide x-rays to dental insurers for use in benefits determination. Central to the Commission's complaint is the following charge:

Par. 2. Since September 1976, respondent and its members, in concert and agree-

ment among themselves, have acted in furtherance of the agreement and concert of action alleged in Paragraph Nine, and have otherwise engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation with dental health care benefits programs containing predetermination and least expensive course of treatment provisions * * * .

As described in paragraph nine of the complaint, the specific acts and practices include: (1) promulgating guidelines and principles for dealing with third-party payers, along with forms and information to facilitate adherence to them; (2) encouraging members to refuse to serve as dental consultants for third-party payers and to refuse to provide x-rays to them for use in benefits determination; and (3) conducting meetings and pledge campaigns among their members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers. **[16]**

The ALJ found that IFD had engaged in these practices. We agree that the record shows clearly that IFD pursued these practices, principally as a follow-up to the activities of the IDA before IFD was formed. The respondent, in fact, does not appear to dispute vigorously that it engaged in these practices but rests its case primarily on the proposition that the conduct was not unlawful under a rule of reason analysis and that it was justified for reasons related to the quality of dental care. In particular, IFD argues that "under the rule of reason the pro-competitive or beneficial effect of respondent's alleged conduct on health and safety, outweighs any anti-competitive or anti-consumer effects." (RAB 4)

The ALJ found that respondent's conduct amounted to a *per se* violation of Section 5 of the FTC Act on the grounds that it constituted a group boycott which is unlawful *per se.* In addition, however, the ALJ found that IFD's conduct substantially harmed competition under a rule of reason analysis so as to violate Section 5 even under a more far-reaching examination of competitive effects.

In reviewing the ALJ's findings, we address first the proper standard of analysis of the reasonableness of the alleged acts and practices. The Supreme Court has stated that some practices which restrain competition should be held *per se* unlawful without the need for substantial inquiry into their competitive effects. Thus, some practices which have been consistently found to harm competition with little or no competitive justification are held *per se* unlawful in order to avoid "the necessity for an **[17]** incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Arizona* v. *Maricopa County Medical Society,* 50 U.S.L.W. 4687, 4691 (U.S. June 18,

1982), quoting *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

Accordingly, courts have determined that *per se* illegal practices include, for example, horizontal division of markets, *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972); price fixing agreements, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); and group boycotts, *Fashion Originators' Guild of America, Inc.,* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

Examination of the group boycott cases reveals some which involve agreements between businesses which were designed to exclude or limit actual or potential competitors from the market. For example, in *Fashion Originators',* 312 U.S. at 467–468, wholesale firms with a substantial market share sought to prevent potential competition from so-called "style pirates" by agreeing to implement an elaborate enforcement plan and an agreement not to sell to non-conforming firms. The Supreme Court held, notwithstanding the tortious nature of the conduct of the "pirates," that the wholesalers' boycott agreement and enforcement plan were *per se* illegal. 312 U.S. at 467–68. In [18] *Klor's,* 359 U.S. at 211–212, the Supreme Court held *per se* illegal an agreement by several manufacturers not to sell to a single retailer upon the solicitation not to deal by the retailer's competitor.

Other group boycott cases involve practices implemented for the purpose of extracting more advantageous business terms or practices for economic gain. For example, in *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30 (1930), an agreement among competing film distributors to utilize only a standard form contract, which contained binding arbitration of disputes provisions, in transactions with film exhibitors and an agreement to refuse to deal with non-conforming exhibitors were held to comprise an illegal concerted refusal to deal. Although the Court had not yet clearly distinguished the *per se* and rule of reasons approach to analysis of restraints on competition, the film distributors' agreement was found unlawful without an elaborate inquiry about competitive effects. The contract arrangement in *Paramount Lasky* would have resulted in a highly probable anticompetitive effect because it eliminated competition as to key provisions in contracts with film exhibitors.

The Supreme Court made clear in *St. Paul Fire & Marine Insurance Co.* v. *Barry,* 438 U.S. 531 (1978), that the concept of "boycott" includes a concerted refusal to deal with another party in an effort to obtain advantageous terms in the commercial relationship. *Id.* at 541. However, the Court did not decide whether a concerted refusal to deal, as examined in *Barry,* was subject to the *per se* test of illegality. *Id.* at 544. [19]

Despite the fact that at least some types of group boycotts have been found unlawful *per se,* we disagree with the ALJ that a *per se* analysis is appropriate here. First, we note that the type of restrictions on competition encountered here have not been the subject of frequent prior antitrust analysis. The conduct by the Indiana dentists involved a group decision to withhold x-rays from parties which were neither customers nor competitors. IFD conspired to withhold a tool of medical diagnosis, the x-ray, rather than all significant aspects of the dentist-insurer transaction. Finally, this arrangement arose in the context of health providers' bargaining with third-party payers as to the mechanisms which could be used to review claims. Because there has not been extensive analysis by the Commission or the courts of this type of restraint, a *per se* analysis is less appropriate. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979); *American Medical Ass'n* v. *FTC,* 94 F.T.C. 701, 1003 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 50 U.S.L.W. 4313 (U.S. March 23, 1982).

Second, we observe that the respondent's conduct is not wholly motivated by an anticompetitive purpose. While, as we discuss below, the practices do have a significant effect in reducing competition, they arise in the context of proffered justifications for their use and thus, are not "naked restraints of trade with no purpose except stifling of competition," which **[20]** would make a *per se* analysis more appropriate. *Broadcast Music,* 441 U.S. at 20; *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963).

Third, as discussed above, it is not clear that this type of group boycott should be subject to a *per se* analysis, even when viewed as one of a class of restraints with which courts have had long experience. While it limits competition among participants in the boycott, it is not aimed principally at excluding competitors. Thus, while we do not express a view as to whether any boycott which is not aimed at excluding competitors should be analyzed under a rule of reason, the lack of clear precedent for a *per se* analysis in this situation is another reason for engaging in an inquiry about competitive effects.[10]

Therefore, we turn to a consideration of the reasonableness of respondent's no-submission requirement. The test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978). To assess the legality

[10] We note that the Supreme Court has recently stated that a rule of reason analysis is not appropriate merely because of the peculiar characteristics of the health care market or because professionals are parties to the challenged conduct. *Arizona* v. *Maricopa County Medical Society,* 50 U.S.L.W. at 4691.

of the IFD restrictions under a rule of reason analysis, we must examine their nature, purpose [21] and effect on competition, including an assessment of any possible procompetitive impact. *Chicago Board of Trade,* 246 U.S. at 238.

The full scope and effect of IFD's own practices can be fully understood only by examining also the activities of IDA and IFD's relationship to IDA.[11] As we discussed in Part II, IDA adopted a manual, which was distributed to all IDA members, specifying "Principles of Acceptability" for dental insurance plans, including the condition that these plans not require the submission of x-rays. The manual contained form letters to be given to patients stating that x-rays would be available to insurers only in the dentist's office and, by inference, directed member dentists not to violate this condition for an "acceptable" dentist-insurer relationship. In addition to distributing this manual, in 1973 IDA conducted a campaign to obtain signed pledge cards from its members by which member dentists promised to comply with the manual's principles. More than 85 percent of the membership promised to comply. (CX 74A) Subsequently, in 1975, IDA conducted a mail survey to determine compliance. [22]

Although IDA's official policies always focused on the use of x-rays by dental insurers, the record evidences a discernable undercurrent of hostility toward third party payment plans as a whole, and particularly plans that contained alternative benefits limitations. Announcing the organizational meeting for the pledge campaign, the co-chairmen, Drs. Rohn and McClure, began their letter: "As you know, there is significant rapid growth of group-funded dental care programs in Indiana. The IDA has *prepared to meet this challenge* through the development and implementation of the 'Indiana Plan.' " (emphasis added) The letter continued to warn that "we must make sure the 'Indiana Plan' continues to work and work well, or we stand the chance of being dictated to by some distant third party." (CX 125) The back of the IDA Approved National Dental Claim Uniform Report Form contained a note to dental patients that included the following:

* * * * * * *

In some plans, the dental insurance contract is written to provide for the least expensive, adequate procedure as determined by the insurance company. The carrier will request x-rays to make this determination. If your contract is written in these terms, please give special attention to the following:

[11] "Late-comers to antitrust conspiracies, who, while knowing of the prior existence of the conspiracy, join it in order to promote the unlawful object for which it was organized, are liable for everything done during the period of the conspiracy's existence." *In Re Nissan Motor Corp. Antitrust Litigation,* 430 F. Supp. 231, 232, (S.D. Fla. 1977).

A. The Indiana Dental Association does not agree with such a contract.

* * * * * * *

(CX 75D) [23]

Similarly, the sample letter to insurers contained in the IDA manual included this explanation for the refusal to submit requested x-rays: "As you know, the Indiana Dental Association's Principles of Acceptability advise dentists not to submit radiographs to a third party because the use of these (x-rays) interfere [sic] with the dentist's professional judgment by altering or suggesting alternative methods of treatment, and possible legal involvement if the radiographs were lost." (CX 47X)

Moreover, it is clear that the concern of IDA's members over possible interference in the doctor-patient relationship was not limited to the effect such interference might have on patient welfare. It also extended to issues of professional pride and the economic well-being of Indiana dentists. Dr. McClure, who later became the first president of IFD, said in a speech to the association's Council on Dental Care Programs in 1974: "We are fighting an *economic war* where the very survival of our profession is at stake. (emphasis added) * * * The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar." (CX 372A) Reviewing some of the "problems" with existing insurance plans, he predicted: "The fight for x-rays will continue, although I have reasons to believe they may start off without them, they will eventually switch to this method of [24] determining benefits. *This is the only way they can control their costs.*" (emphasis added) (CX 372E)

With the formation of IFD, the economic motive became more explicit. As IFD's first Secretary explained in a letter to an Evansville dentist during the formation of the federation: "If you will read the object of the association [ADA] in the constitution and by-laws, you will realize that the association was not designed nor intended to represent us in socio-economic or political areas. * * * It is our opinion that a more suitable vehicle is needed to represent us in these areas and that a union is the most advantageous choice to satisfy the needs previously mentioned." (CX 484A–B) IFD's Constitution and By-laws state thirteen objectives for the organization. The first four are the following:

(a) To represent dentists in *all socio-economic matters,* negotiations and grievances with employers, third and fourth parties or any group that is involved in financing or delivery of dental care. The ultimate purpose being to promote better patient care and to prevent abuses and correct inequities in the delivery of dental care to the public,

(b) To seek to insure *adequate compensation* and proper working conditions for dentists commensurate with their training and skill and the responsibility they bear for the life and health of their fellow human beings, [25]

(c) The establishment or approval of appropriate utilization review or peer review procedures which do not interfere with the doctor-patient relationship and the maintenance of the highest quality of dental care,

(d) To associate together all dentists for their mutual benefit and protection * * *.

(emphasis added) (CX 14A)

These objectives were emphasized in communications among members. For example, the June 1, 1978, newsletter of IFD Chapter II stated: "Those of us in the I.F.D. believe that WE are the ONLY organization uniquely set up to protect the socio-economic areas of our members. The working conditions of our members is [sic] important to us and must remain foremost in our actions." (CX 499A)

As we discussed more fully in Part III, there is no doubt that IFD was created to follow up on IDA activities and goals. It is equally clear that a major reason for creating IFD was to avoid the antitrust laws under the mistaken impression that IFD would be exempt as a "union." (CX 476B; CX 484A; CX 489B) IFD included in its Constitution a procedure for authorizing "strikes, job actions, or other forms of economic pressure" by local chapters to accomplish its objectives. (CX 13Q) Moreover, the Constitution provided for discipline of IFD members for failure to conform to the Constitution and By-laws and for "any action detrimental to the welfare of this organization." (CX 13T–U) While the Constitution did not provide a sanction specifically for failure to participate in a boycott, the Executive Committee considered on at least two occasions the question of "retaliatory gestures" against dissident members and [26] clearly considered "severe measures" of reprisal a possibility, albeit as a last resort. (CX 512A and CX 522; Tr 2429–31)

In 1977 IFD adopted and disseminated the IFD Work Rule, which provided that a dentist has a responsibility to prevent a determination of a patient's condition without the benefit of a complete dental examination. The clear understanding of this rule was that insurance company use of x-rays (without an examination of the patient) in claims review was a form of "determination" of the patient's condition that the dentist was obliged to prevent. After formal adoption of IFD's Work Rule, dentists, using a form prepared by IFD, refused to provide x-rays to third-party payers. Thus, the practical implementation of the Work Rule was to refuse to cooperate with claims review programs which relied upon submission of x-rays. The effect of re-

spondent's conduct was to reduce competition among dentists to cooperate with dental reimbursement plans and, by doing so, to thwart the efforts of individual insurance companies to contain costs by offering coverage for only the least expensive adequate course of treatment.

There is no doubt that IDA's practices, later continued by IFD, had an effect on the way in which dentists cooperated with dental insurance plans. It is quite clear that dental insurance companies were unable to obtain x-rays with the regularity and frequency desired in order to carry out their claims review process. Aetna, for example, began a program for employees of International Harvester on July 1, 1971. The plan covered employees in primarily 23 states and several foreign countries. [27] (ID 40; RX 99B) Only in Indiana did Aetna experience any difficulty in obtaining x-rays for review of dental treatments. (RX 99B–C; Tr 1243) Within one year, there was a backlog of approximately 600 unpaid claims, because of Aetna's inability to verify the maximum allowable benefits. (Tr 1267, 1274) In a one-time effort to eliminate this backlog, the company's dental consultant visited the offices of all the dentists who had refused to submit x-rays and reviewed the claims with them, also urging them to submit x-rays in the future. (Tr 1268) There were two general reactions to his plea: "one, dentists who said despite the fact that you seem fair, I will not send x-rays to you; and others who said I would like to, but I don't dare to." (Tr 1275) In January, 1974, Aetna's consultants began doing in-mouth examinations of claimants in its Ft. Wayne office; they continued this practice until the end of November, 1978. (Tr 1276–79) In that period, the company conducted 4,700 exams at an estimated cost of ten dollars each. (Tr 1279)

CG also modified its practices in an effort to deal with IDA's demands. CG came to a "gentleman's agreement" with IDA whereby the claim form would continue to require x-rays but CG would not insist on the dentist's compliance. (ID 74) CG also allowed a dental consultant, approved by IDA, to operate out of the dentist's own office rather than CG's claim office as a result of IDA pressure. (ID 78) Both of these cases illustrate an insurance company, confronted by the economic power of united dentists, responding to that economic power rather than to a [28] dental services market characterized by competition among dentists.

Moreover, it is clear that IFD's practices continued to have an effect similar to that initiated by IDA; they were, indeed, an effective continuation of the IDA conspiracy. IFD representatives met with CG to discuss CG's x-ray submission policies, a meeting which concluded in CG's decision not to make further x-ray requests from Madison County dentists. (ID 117) IFD's President, Dr. McClure, also met with a representative of Brockway Glass, an employer located in Madison

County, which had arranged for employee dental coverage through Metropolitan Life Insurance Company. McClure stated that the federation of dentists he represented would not submit x-rays. (ID 118; Tr 1625) In short, the record contains numerous examples where the dentist-insurance company relationship that would have existed in the absence of this market power was altered.

There is no doubt that IDA and IFD were able to achieve substantial market power by colluding. In 1974, 85–88 percent of Indiana dentists belonged to IDA. (CX 303E) In particular areas, IFD was able to achieve remarkably high degree of participation. In Madison County, 95 percent of all practicing dentists had joined IFD Chapter I by September 8, 1976, according to the chapter's secretary. (CX 484B) The Chapter II news letter reported in September, 1977, that "[a]ll but a few dentists in our four county area are now members of the Federation." (CX 549A) Even though the actual total membership of IFD was small, its market power in some localities was clear **[29]** from its effect on the behavior of insurers and the functioning of the dentist-insurer relationship.[12]

Such concerted activity by competitors resulted in reducing or eliminating competition among dentists as to their policy of dealing with third-party payers. Patients who were covered by dental plans providing for cost-containment programs such as those here found it difficult to purchase care from dentists who would satisfy the terms of their coverage. In the absence of such concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to treat patients and comply with the requests of patients' third-party insurers. By colluding, competitor dentists were freed to some extent from these market forces because they knew other participants in the boycott would also refuse to cooperate. Consequently, the dentist-insurer relationship was determined by economic coercion, not by market competition. The final victim in this distortion of the market was the patient policyholder who lost the value of his insurance company's efforts to contain costs. **[30]**

Complaint counsel have argued that the conspiracy had other effects on competition, including that insurers were less able to compete on the basis of cost-containment and that patients were deprived of information that might lead them to switch dentists. As for the effect on competition in the dental insurance market, we agree that a secondary effect of concerted behavior on the part of dentists was to

[12] As in any rule of reason case, attention must be paid to market definition in order to assess competitive effects. No elaborate analysis is required here, since the record shows that under IDA's leadership, the conspiracy spanned many, if not most, localities in Indiana. Under the leadership of IFD, it continued to be strong in the local areas covered by that organization's three chapters. The record shows no competition from out-of-state dentists, except in two localities near Louisville, Kentucky. (CX 151B; CX 186C; CX 76F)

prevent insurers from implementing cost-containment efforts. This may well have reduced competition among insurers. The record shows that dental insurance grew in significance in Indiana beginning in the mid 1970's as various insurers offered group coverage to employers. Inevitably, a principal concern of both employer and employee groups was the premium. Consequently, both employer and employee groups were concerned about cost-containment measures practiced by insurers. This concern is illustrated by General Motors' insistence that its claim form continue to require x-rays, despite CG's willingness to provide an explicit exemption for IDA members. (CX 327W) Similarly, Aetna representatives told IFD representatives that Aetna's market survival required cost-containment measures. (CX 284B) **[31]**

Concerted behavior among competitors which prevents or hinders the marketing of goods or the implementation of services by competitors in another market may harm competition in that other market.[13] Here, respondent's efforts to achieve a uniform course of conduct among dentists in their dealings with dental insurers affected a significant aspect of the insurers' businesses, *i.e.*, the operation of cost-containment efforts through the "alternative benefits" mechanism. The harm to these efforts may have reduced competition among insurers by preventing them from competing on the basis of reduced premiums. Respondent's activities may also have prevented new entrants from obtaining customers by offering innovative and effective cost-containment measures. However, despite complaint counsel's argument, the Commission's complaint did not clearly allege harm to competition in the dental insurance market, and conclusions about competitive harm to this market are unnecessary to our decision. Accordingly, we decline to make such a finding. **[32]**

Respondent makes a variety of contentions that the collective refusal to provide x-rays did not harm competition, including the assertions that there was not an absolute "shut off" of x-rays to insurance companies (RAB 15–16) and that the benefits of predetermination are not well-established and might cost more than they are worth. (RAB 17) While it is true that respondent was willing to allow *some* arrangement whereby x-rays could be examined by insurers—in particular, allowing insurers' consultants to make visits to the dentists' offices—the record is clear that this was prohibitively expensive. (ID p. 89, fn. 337) Moreover, even if the procedure were feasible at a higher cost, coercing parties into adopting such a procedure through collusion of

[13] For example, in *Fashion Originators'*, concerted action by manufacturers to protect themselves from competition by "style pirates" also harmed competition at the retail level by narrowing the sources from which retailers could buy dresses. 312 U.S at 465. In another case, a boycott by lumber retailers of wholesalers that were also competing at retail affected not only retail competition but also impeded wholesale trade by reducing the number of potential purchasers from the boycotted companies. *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S 600, 614 (1914).

competitors still distorts the competitive process. Commercial dealings are structured by leverage of combined market power rather than by competition.

Finally, we reject the IFD's position that to establish liability, the record must establish that predetermination, or more generally, use of x-rays by dental insurers to determine what services they will pay for under alternative benefits coverage, is effective in containing costs. (RAB 17) We do not require an analysis of the actual net impact on the operating costs of insurers or of the actual dollar losses to policyholders or employers in order to conclude that respondent's actions are anticompetitive. The task of identifying the precise impact of these types of restrictions and segregating the effects of other forces is likely to be infeasible. *See, AMA,* 94 F.T.C. at 730. [33] To require such a showing would often impose an impossible burden on complaint counsel and preclude prohibiting plainly anticompetitive restraints until their precise impact could be measured. Moreover, it is not for IFD or the Commission to judge the efficiency of the arrangements selected by insurance companies to control costs. An antitrust violation cannot be justified on the grounds that it sought to remedy a poor business decision by the targets of a boycott. It is enough that the restraint is shown to have significantly distorted the competitive process by forcing insurers to comply with the demands of united competitors, thereby significantly altering the nature of their claims review process and their attempts to implement cost-containment measures.

In summary, we find that IFD's practices substantially limited competition among dentists in their willingness to cooperate with dental insurance cost-containment programs.[14] We turn now to respondents' principal argument in defense—that the restraints on competition resulting from the challenged concerted behavior resulted in benefits adequate to offset any anticompetitive effect. IFD claims that the restraints had a procompetitive effect which offset any harm to competition and, more broadly, that the restraints resulted in social benefits, particularly an improvement in the quality of dental care. [34]

We note at the outset that the burden of proving sufficient justification for restraints which have been shown substantially to harm competition rests with respondents. Such justifications cannot be speculation only but must be established by record evidence in order to be considered an adequate justification for otherwise anticompetitive behavior. We consider first IFD's argument that its conduct was procompetitive.

[14] As for complaint counsel's argument that patients were deprived of information that would lead them to switch dentists, we agree that this is a possible effect of the boycott. Based upon the record, however, we cannot infer an adequately significant effect on competition from this limitation on information. Therefore, we decline to make a finding on this point.

As discussed above, a principal device used by IFD for achieving concerted behavior on the part of member dentists was its Work Rule. The Work Rule in part provided:

> The patient's dentist, therefore, has a moral and legal responsibility to not allow a determination of his patients [sic] condition to be made for any purpose, without the benefit of a complete examination, which takes into account all of the elements described.

(CX 537A)

It is clear from the record that the principal purpose and effect of this Rule was to refuse to provide x-rays to insurance companies that wished to use them along with other information to review claims for reimbursement.

IFD argues that concerted adherence to the Work Rule actually promoted competition among dentists:

> Certainly promoted are novel means of competing concepts of dental care, such as employer or union organized clinics. Competition is naturally promoted among dentists who treat only after total diagnosis, in that their total treatment plan will be more successful from both a preventative viewpoint and long term maintenance of oral health. Error is less likely, thus reducing needed corrective work. Proper diagnosis will promote proper services, and satisfied patients will patronize those dentists.

(RAB 24–25) [35]

As to IFD's proposition that "novel means of competing concepts of dental care" are promoted, this is simply unsupported by the evidence. IFD has pointed to no record evidence, or even to any logical argument, suggesting that the Work Rule was in any way necessary to promote "total treatment plans" or any other novel form of dental care. Rather, individual dentists were free to offer such plans or not, just as they would have been in the absence of the Work Rule. Respondent's essential point appears to be simply that such plans were *permitted* by the Work Rule. While this may well be true, it hardly constitutes a showing that the Rule was necessary to achieve some competitive benefit that would have compensated for the Rule's anticompetitive effect.

A similar flaw defeats IFD's second proffered justification, that the Work Rule promoted higher quality care and more satisfied patients. The heart of this position seems to be the contention that the Rule promoted the health of the people of Indiana by preventing insurance companies from reaching erroneous conclusions regarding the least expensive adequate course of treatment for dental patients.[15] Such

[15] There is evidence that some members of IFD objected to the fundamental policy of insurers of covering only the least expensive adequate course of treatment, preferring dental coverage for the "best" treatment that could be provided the patient. However, respondent has not sought to justify its actions on the ground that such a policy is harmful, and this does not appear to have been an official position of IFD.

erroneous conclusions would, the argument goes, cause insurance companies to deny claims for adequate treatment and thereby pressure patients, and through them their dentists, to opt for less than adequate [36] treatment. Two practices of insurers could lead, in IFD's view, to erroneous claims determinations: (1) undue reliance on x-rays, particularly due to the failure to examine the patient personally, and (2) the examination of x-rays by non-dentists.

These contentions, too, are lacking in any evidentiary support. IFD has not pointed to any evidence—or even argued—that any consumers have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous. Not a single instance has been cited where any dentist agreed to provide less-than-adequate treatment because of the fear of an erroneous insurance determination. Indeed, with respect to the examination of x-rays by non-dentists, the record shows that non-dentists are authorized by insurers only to *approve* claims; determinations which deny payment must be made by a dental consultant. (ID 158–61) Consequently, it is difficult to understand how patients could even possibly be harmed by the insurers' use of non-dentists.[16] [37]

Moreover, the courts have properly shown great hesitancy in accepting such justifications for clearly anticompetitive acts. In *National Society of Professional Engineers,*[17] the Supreme Court announced that a rule of reason analysis is confined to an assessment of effects on competition and necessarily excludes a justification that other social values which may be advanced outweigh the loss of competition. In that case, the petitioners, a society of professionals selling engineering services, had argued that competitive bidding by the society members would be dangerous to the public health by reducing the quality of services provided. The Court rejected this type of justification on the basis that "the Rule of Reason does not support a defense based upon the assumption that competition itself is unreasonable."[18]

The Court's decisions have not completely clarified this distinction between effects on competition, which should properly be considered under the rule of reason, and other effects which should not be considered. One factor in making this distinction is whether the challenged conduct amounts to a clear attempt to substitute a private association's judgment about the benefits of competition for a Congressionally-expressed preference in favor of it. This was the case in *Professional Engineers,* where a private association argued that competition itself was [38] undesirable because it led, in that industry, to poor quality—a proposition the Court was unwilling to accept.

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[16] Respondent's primary argument regarding the screening of x-rays by lay persons, that it violates state law, will be discussed in Part V of this Opinion in connection with the state action defense.

[17] *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679 (1978).

[18] *Id.* at 696.

In other cases, challenged restraints have limited competition in certain ways only to increase it in other ways, for example, by creating a new product to be offered. This was the case in *Broadcast Music,* where the Court held the rule of reason applicable to a blanket licensing scheme which necessarily fixed the prices among competing composers. Similarly, restrictions on the timing of transactions have been upheld as contributing to the efficiency of organized markets.[19] Thus, an agreement by competing health professionals to allocate admitting privileges at a hospital facility to avoid overcrowding and improve efficient use of the facility could be assessed under a rule of reason.

A third category of cases involves restraints which are clearly intended to achieve an end other than a limitation on competition and in which the effect on competition is at most incidental, in light of the actual purpose of the restraint. For example, sanctions of athletes for gambling in professional sports competition have been upheld.[20] Thus, guidelines promulgated by a professional health association recommending the avoidance of a drug discovered to be dangerous could not be considered an antitrust violation in the absence of any purpose **[39]** to limit competition. Similar results have been reached where boycotts are clearly political in nature and are not aimed at competitors.[21] As in the application of any legal standard, some situations will present difficult factual questions as to the effect on competition and the true purpose of the restraint. Moreover, some cases will call for the exercise of sound prosecutorial discretion by the Commission in considering how non-competitive values relate to the nature of the restraint and the rule of reason analysis set out in *Professional Engineers.*

Fortunately, we need not resolve all these questions here. Even when self-regulation may have been necessary for some legitimate purpose, the courts have insisted that the restraints go no further than is necessary to achieve the desired goal.[22] We applied this principle in our *AMA* decision, where we reviewed a professional association's ethical restrictions on price advertising and price competition. We found that an absolute ban on advertising, including non-deceptive advertising, lessened rather than promoted competition, and that the restrictions were much broader than necessary to accomplish the legitimate, pro-competitive goal of preventing deceptive advertising. 94 F.T.C. at 1010. **[40]**

A fortiori, when self-regulation is not actually necessary for any

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[19] *Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1918).

[20] *Deeson* v. *Professional Golfers' Ass'n,* 358 F.2d 165 (9th Cir. 1966), *cert. denied,* 385 U.S. 846 (1966); *Molinas* v. *National Basketball Ass'n,* 190 F. Supp. 241 (S.D.N.Y. 1961).

[21] *See Missouri* v. *N.O.W.,* 620 F.2d 1301 (8th Cir.) *cert. denied,* 449 U.S. 842 (1980).

[22] *See e.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961).

legitimate purpose and has clear anticompetitive effects, the courts have not hesitated to strike down the restraints. For example, in *American Medical Ass'n* v. *United States,* 130 F.2d 233 (D.C. Cir. 1942), *aff'd,* 317 U.S. 519 (1943), an association of physicians attempted to induce hospitals not to deal with doctors who participated in prepaid medical programs. The association argued that its concerted behavior was justified because, in its view, these programs were contrary to the public interest and participation in them was unethical. The Supreme Court refused to review the finding of the court of appeals that this conduct harmed competition and that there were alternative methods by which the association could advance its views about alternative delivery systems.[23] 317 U.S. 613 (1943).

The restraint involved here falls squarely into this category of cases. IFD's concerted refusal to furnish x-rays to third-party payers substantially harmed competition among dentists by eliminating incentives for individual dentists to cooperate with cost-containment programs of third-party payers. This refusal to deal reduced consumer choice and impaired insurance companies' ability to conduct cost-containment programs. IFD has presented no evidence to even suggest that these restraints were necessary to serve any legitimate, pro-competitive purpose. There is no basis for concluding that **[41]** IFD's concerted refusal to deal encouraged development of new methods of care delivery or otherwise encouraged competition among individual dentists. We therefore find that IFD's conduct constituted an unfair method of competition in violation of Section 5 of the FTC Act.

The complaint also alleged that the activities of respondent were "unfair acts or practices" within the meaning of Section 5 as well as unfair methods of competition. It is clear that practices *may* be both unfair methods of competition and unfair practices. For example, in *AMA,* 94 F.T.C. at 1010, we found that AMA's restrictions on price advertising were unfair because they impeded the flow of information about the availability and price of medical services to consumers.

In determining whether a practice is unfair, we are concerned primarily with its impact on consumers, principally individuals purchasing a product or service for their own consumption or investment. In brief, consumer injury that is substantial, not reasonably avoidable, and not outweighed by offsetting benefits to competition or consumers is the primary criterion for a finding of unfairness. (*See* Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, December 1980.) In addition, the Commission also relies where possible upon established public policy in determining which practices are unfair. *Id.* **[42]**

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[23] *See also Michigan State Medical Society,* Docket No. 9129, [101 F.T.C. 191] where we addressed similar issues and reached a similar result.

The record in this case contains some evidence of consumer injury in the form of denied or delayed reimbursement for dental care expenditures. However, neither the parties nor the ALJ have analyzed the issue of unfairness liability to any degree. Because our finding of an unfair method of competition in this case is sufficient to support the relief ordered, we decline to decide whether the challenged practices are also unfair.

V. State Action

Respondent and Intervenor, the State of Indiana, adopting Part IV. D. of respondent's appeal brief as its own, assert that the state action doctrine forecloses antitrust liability for the alleged anticompetitive conduct, citing the development of the caselaw in *Parker* v. *Brown,* 317 U.S. 341 (1943), *Asheville Tobacco Board of Trade, Inc.* v. *FTC,* 263 F.2d 502 (4th Cir. 1959),[24] *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), and *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978). That doctrine exempts from federal antitrust law certain state action and actively supervised private action undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy that consciously rejects unrestrained competition in favor of other social values. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.,* 439 U.S. 96, 107 (1978); *California Retail* [43] *Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980).

Respondent asserts that the Indiana Dental Law (Indiana Code 25–14–1–1 *et seq.*), which prohibits the unlicensed practice of dentistry, clearly prohibits the lay screening of dental x-rays by employees of dental insurers.[25] By virtue of this [44] prohibition, the argument

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[24] In this case, the court of appeals applied the state action doctrine to the enforcement of the FTC Act. While all Supreme Court interpretations of the doctrine have concerned the Sherman Act, we assume for purposes of this decision that the doctrine applies equally to an enforcement action under the FTC Act, when the allegation of unfair methods of competition is based on Sherman Act principles.

[25] The law provides in pertinent part:

Sec. 23. Any person shall be said to be practicing dentistry within the meaning of this chapter who uses the word "dentist" or "dental surgeon" or the letters "D.D.S." or "D.M.D." or other letters or titles in connection with dentistry:

or owns or operates a dental office or is manager or conductor of the same;

or advertises or permits to be advertised by sign, card, circular, handbill, newspaper, radio, or otherwise that he can or will attempt to perform dental operations of any kind;

or offers to diagnose or professes to diagnose or treats or professes to treat any of the lesions or diseases of the human oral cavity, teeth, gums, maxillary or mandibular structures;

or extracts human teeth or corrects malpositions of the teeth or jaws;

or administers dental anesthetics, whether local or general;

or makes x-rays pictures of the human teeth or jaws;

or makes impressions or casts of any oral tissues or structures for the purpose of diagnosis or treatment thereof or the construction, repair, reproduction or duplication of any prosthetic device to alleviate or cure any oral lesion or replace any lost oral structures, tissue, or teeth;

or engaged [sic] in practices included in the curricula of recognized dental colleges * * *.

continues, the collective private actions of IFD and its members to frustrate the lay screening of x-rays is protected from liability under the antitrust laws.

As discussed further below, respondent's "state action" argument fails in several respects. First, and most fundamentally, the Indiana law does not affirmatively express any policy in favor of collusion among dentists in order to prevent or influence the use of x-rays by insurance companies. Respondent, in fact, does not appear to argue that the State of Indiana has expressed a policy against competition among dentists, which must be the principal concern of a "state action" analysis. Second, it is far from clear that the Indiana statute prohibits lay persons from reading x-rays for purposes of screening dental insurance claims, as opposed to determining treatment. Finally, respondent has not shown that its conduct, which essentially amounted to private enforcement of this state statute, was supervised by state authorities. We discuss each of these points in turn.

Assuming for a moment that the Indiana statute does prohibit lay persons from reading x-rays and that "dentists who knowingly [sic] submit radiographs (x-rays), or other diagnostic data to third persons, including insurance companies that allow lay persons other than licensed dentists to review such data, are aiding and abetting the unlawful practice of dentistry" (RAB 46), such a "state policy to supplant competition" (RAB 39) between dentists and non-dentists is insufficient to protect the activity [45] at issue in this case. This case concerns concerted actions among dentists regarding their dealings with dental insurers; and the Indiana legislature did not compel, authorize, or even contemplate private agreements among dentists not to cooperate with dental insurers that might be using lay persons to read x-rays—or other concerted efforts to influence the business practices of insurers. There simply is no "clearly articulated and affirmatively expressed" state policy concerning such elimination of competition among dentists in their dealings with insurers.

Respondent argues that "the Indiana dentists who choose to obey Indiana Dental Law cannot be in violation of antitrust law." (RAB 48) But this is not a case of individual dentists simply conforming their conduct to state law.[26] Apparently, respondent would have us conclude that Congress intended for federal antitrust laws to give way when private parties, by conduct which would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law. No Supreme Court decision ar-

[26] Indeed, Indiana state law seems actually to have little to do with the activities charged here. Neither IDA's Principles of Acceptability nor IFD's Work Rule concerned *who* at insurance companies should or should not read x-rays. The focus of these policies and the activities of IDA and IFD was, rather, the notion that x-rays should not be used in any manner without a personal examination of the patient. We can determine no way in which the challenged conduct was logically directed toward compliance with state law.

ticulating the state action doctrine can be read to endorse such an interpretation of congressional intent. [46]

Furthermore, we cannot accept respondent's contention that Indiana law clearly prohibits the screening of x-rays by lay employees of insurers for the narrow purpose of referring questionable claims to dental consultants. The Indiana statute does not specifically address such conduct (although it does prohibit lay persons from taking x-rays), and the state has never sought to enforce the statute against insurers that use non-dentists in such a way. Indeed, on August 15, 1978, IFD brought suit against the state and the Indiana State Board of Dental Examiners alleging that they had "wholly failed, refused, or neglected to take any action to enforce the laws of the State of Indiana" as interpreted by IFD.[27] (CX 508A, D) Therefore, the applicability of the statutory prohibition on the unlicensed "practice of dentistry" to such a situation has not been considered by the Indiana Courts. In Pennsylvania, however, a very similar statute has been held not to prohibit a first review of radiographs by a lay clerk to determine whether they satisfy Blue Shield standards. *Pennsylvania Dental Ass'n* v. *Comm. Ins. Dept.*, 398 A.2d 729, 734 (Pa. Cmwlth. 1979).[28] Furthermore, an [47] Illinois appellate court has held that even as performed by a dentist, the act of "merely corroborating the claim presented [by reading an x-ray provided to an insurer] so as to know whether or not payment of the cost thereof should be made" is not the practice of dentistry. *Pfluger* v. *Sundstrand Corp.*, 405 N.E.2d 12, 16 (Ill. App. 1980). Particularly in light of these opinions, it cannot be concluded that there is a "clearly articulated and affirmatively expressed" state policy concerning such conduct.[29]

In furtherance of its state action argument, respondent has pointed to the issuance of a 1974 unofficial advisory letter of the Deputy Attorney General of Indiana (IX–5), various bulletins or letters subse-

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[27] The suit against the state and the board was dropped when the state agreed to intervene in this case. (ID 183)

[28] The Pennsylvania statute provides:

> A person engages in the "Practice of Dentistry," within the meaning of this act, who diagnoses, treats, operates on, or prescribes for any disease, pain or injury, or regulates any deformity or physical condition of the human teeth, jaws, or associated structures, or conducts a physical evaluation, or administers anesthetic agents, or who fits, constructs, and inserts any artificial appliance, plate, or denture for the human teeth or jaws, or who holds himself or herself out as being able or legally authorized to do so. 63 P.S. § 121, as quoted by the court at 398 A.2d 734 n.4.

[29] Respondent has argued that in addition to constituting an unlawful diagnosis, the reading of x-rays by insurance company employees also violates a provision of the dental code that includes in the definition of the practice of dentistry "practices included in the curricula of recognized dental colleges." Indiana Code 25–14–1–23. Radiology is a required subject in the curricula of state dental schools. 828 Indiana Administrative Code 1–1–1(c) (1979 Ed.). Therefore, respondent argues, the reading of x-rays by unlicensed persons violates the statute.

Bacteriology, anesthesia, pathology, and "medicine" are also subjects required to be taught in the dental schools. Yet, surely respondent would not suggest that they are the exclusive domain of dentists. Indeed, as the Supreme Court of Indiana has held, "practices included in the curricula" does not refer to *subjects* taught in dental colleges "but to those things which are *practiced as provided* in the curricula, which evidently mean the things practiced *in the dental clinic*, such as, operative prosthetic dentistry, crown and bridge work, inlay, and orthodontia." (emphasis added) *State* v. *Williams*, 5 N.E.2d 961 (Ind. 1937). This provision of the statute therefore, is of little independent significance.

quently issued by the State Board of Dental [48] Examiners (*e.g.* IX 6, IX 9), and a joint letter issued by the State Board and the Insurance Commissioner on September 24, 1979 (IX 162). In all of these documents, the Indiana Dental Law is interpreted as prohibiting the screening of dental x-rays by lay persons.[30] However, as the ALJ has explained, none of these documents constitute action of the state acting as sovereign, since none was developed according to the applicable requirements of the Indiana Administrative Procedure Act. (ID 152–153, 167–181)[31] Respondent has apparently conceded this point and has argued not that these documents establish the state policy regarding the screening of x-rays, or even that they constitute some evidence of the state policy, but rather that they evidence "state supervision of the scheme chosen to replace the rules of the market place." (RAB 39)

Conduct by private parties that would otherwise violate the antitrust laws is not immunized by the state action doctrine unless the activity is "actively supervised" by the state. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. at 105. Because respondent did not address the question of whether its *concerted* activities were compelled or authorized by a clearly articulated state policy, it also did not consider whether those activities were actively supervised by the state. [49] Instead, it pursued the misguided argument that the practice of dentistry by *individual* dentists in Indiana was being supervised adequately by the state, through the State Board of Dental Examiners. We need not consider the issue of supervision in this case in any event, because respondent has not satisfied the requirement of establishing a clearly articulated state policy regarding the challenged conduct.

In addition to supporting respondent's state action arguments, intervenor asserts that in this case the Commission "is clearly attempting to invade the State's sovereign right pursuant to the Tenth Amendment" to regulate the practice of dentistry in Indiana. (IAB 7–8) However, as the above discussion reveals, the authority of the State of Indiana has not been questioned by the Commission in this case. The Commission has not questioned the validity of the Indiana Dental Law or the manner in which it has been enforced by the state. The sole focus of this case is the concerted private actions of IDA, IFD, and their members—actions in no way compelled or expressly contemplated by Indiana law. Furthermore, the Commission's Order against respondent will not interfere with the state's enforcement of the Dental Law, even if it should seek to enforce the interpretation

[30] We note that all of these documents postdate some of IDA's activities in furtherance of the IDA–IFD conspiracy —most notably its 1973 pledge drive for support of its Principles of Acceptability.

[31] Since this is the case, we need not consider whether the state board is authorized to promulgate substantive regulations defining the practice of dentistry.

of it asserted in this proceeding. The Order does not compel any dentist to cooperate with an insurance company that uses lay persons to screen dental x-rays, nor does it give any form of protection to or approve of such a screening procedure. Therefore, the Commission's order does not impinge on the ability of the State of Indiana, acting as sovereign, to **[50]** regulate the practice of dentistry in the manner the state sees fit.

VI. Collateral Estoppel

On July 17, 1979, the Commission was ordered by Judge Cale J. Holder, United States District Court, Southern District of Indiana, to allow the State of Indiana to intervene in this proceeding. (IX 1000U) (The background on this order, which the Commission did not appeal, is explained in the Initial Decision, findings 191–207.) Respondent and Intervenor, adopting Part IV.E. of respondent's brief as its own, assert that various of Judge Holder's findings of fact and conclusions of law foreclose the Commission from "further litigation of the state action issue." (RAB 49)

Respondent claims that the following "findings of fact" by the judge are pertinent:

2. Plaintiff Indiana State Board of Dental Examiners (hereinafter Board), pursuant to I.C. 25–14–1–1 *et seq.*, has been granted the duty and power by the Indiana General Assembly to administer, supervise and enforce the Indiana Dental Act—which provides for the regulation of dentists and the practice of dentistry within the State.

6. Since at least 1887 the State of Indiana, pursuant to the police power reserved to it as a sovereign state, has had legislation regulating dentists and the practice of dentistry.

17. The State of Indiana has and is, actively regulating both dentists and the practice of dentistry in the State. **[51]**

18. Under the mandate of Indiana Law, Indiana dentists are prohibited from submitting their dental X-rays to third party insurers who employ "dental consultants," who are not licensed to practice dentistry, to read or diagnois [sic] the X-rays. (IX 1000Z5,6,9)

Respondent also relies on these conclusions of law:

3. The order proposed by the Secretary of the F.T.C. would infringe on the State's right to regulate the practice of dentistry within the State as reserved to the State under its police powers by the Tenth Amendment to the Constitution of the United States. *Linder* v. *United States,* 268 U.S. 5 (1925). *F.T.C.* v. *Simeon Management Corp.,* 391 F. Supp. 697, 705 (N.D. Cal., 1975) *aff'd* 532 F.2d 708. *Cf. National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

6. The F.T.C. is proceeding beyond its jurisdiction in attempting to regulate the practice of dentistry in the State of Indiana and should be enjoined from doing so.

Leedom v. *Kyne,* 358 U.S. 184 (1958). *Jewel Cos.* v. *Federal Trade Comm.,* 432 F.2d 1155 (7th Cir., 1970). (IX 1000Z10)

Contrary to respondent's assertion, these findings, even assuming the doctrine of collateral estoppel applied, would not preclude the Commission from considering here whether the state action doctrine protects respondent's conduct. The court did not consider all of the elements of the state action doctrine; nor did it purport to do so.[32] Assuming the Commission were bound by the court's "factual" finding #18, respondent's state action defense would still be defeated by the fact that its actions were **[52]** not compelled or expressly contemplated by Indiana law—they were purely private conduct. As to the court's legal conclusions, they do not appear to have any relevance to a state action analysis. Rather, they pertain to the Commission's jurisdiction in this case in light of the state's purportedly exclusive powers to regulate the practice of dentistry in Indiana.

Furthermore, we concur with the ALJ's finding that the court's determinations were not essential to the judgment ordered; consequently, the doctrine of collateral estoppel does not apply here.[33] When Judge Holder ordered the Commission to allow the State of Indiana to intervene in this proceeding, he adopted *in toto* the state's proposed findings. (*See* IX 1000Z5–10 and CX 853 A–G) However, these findings had been offered in support not only of the proposed order ultimately granted by the judge, but also of an order directing the Commission to terminate this proceeding. Obviously, many findings necessary to support the latter order would not be necessary to support the former. **[53]** Legal conclusions #3 and #6 appear to be two such findings, since they deal with the Commission's jurisdiction. Indeed, it would seem that these conclusions would have compelled the judge to order this proceeding terminated. Thus, we believe that these conclusions were not essential to the judgment entered. The court's conclusion of law #5 would seem to have been sufficient:

5. The State meets the requirements for intervention as established by the FTC in the [sic] *Firestone Tire and Rubber Company,* Dkt. 8818, 77 F.T.C. 1666, 1669 (1970) in that *the issues the State seeks to raise* cannot be properly raised and argued by the current parties to the proceeding and only minimal additional cost and time will be required by its intervention. (emphasis added) (IX 1000 Z10)

[32] Indeed, it would have been premature for the court to rule on the applicability of the state action doctrine to this case before the conclusion of the administrative proceeding. *California ex rel. Christensen* v. *FTC,* 549 F.2d 1321 (9th Cir.), *cert. denied,* 434 U.S 876 (1977).

[33] It is beyond dispute that an issue must have been decided necessarily in a first action in order for reconsideration of that issue to be barred in a second proceeding. *Cromwell* v. *County of Sac,* 94 U.S. 351, 354 (1876); *Haize* v. *Hanover Ins. Co.,* 536 F.2d 576, 579 (3d Cir. 1976). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination *is essential* to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added) Restatement, Second, Judgments § 27 (1982).

We agree with complaint counsel that it would be anomalous for the court to have ordered the State of Indiana's intervention, if it intended to foreclose any argument on the issues the state sought to raise. We also agree that the Commission is not required to accept the court's subsequent characterization of all of its findings as necessary for the relief sought,[34] when our own analysis compels its rejection. *Hartmann* v. *Time, Inc.*, 166 F.2d 127, 138 n.17 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948). **[54]**

VII. Order

The ALJ entered an order against IFD, dissolving it as an entity, and against the members of IFD, prohibiting them from collectively refusing to submit x-rays or deal with anyone to "force their will on the target of such boycott." Complaint counsel did not propose an order dissolving IFD as an organization but did propose additional provisions, including a more general ban on coercion of dental insurers, a prohibition on attempting to influence consumers' choice of dentists based upon the dentist's cooperation with insurers, and a ban on coercing the insurer's choice of dental consultants or the consultant's judgment.

We decline to accept the ALJ's conclusion that an order dissolving IFD is necessary. It is true that the courts have upheld dissolution of organizational entities where they have been principally designed to implement an antitrust violation and where dissolution was the most effective way of preventing the recurrence of the violation.[35] We also agree with the ALJ that IFD was created primarily to continue the implementation of IDA's boycott of dental insurers. However, we note that IFD's constitution and bylaws contain objectives other than coercing dental insurers. Moreover, there are certainly legitimate **[55]** functions its members may wish to pursue through the vehicle of a special organization such as IFD. Consequently, we believe it is adequate to ban specific activities of IFD and to rely upon compliance with the terms of these restrictions, in order to prevent a recurrence of antitrust violations and to restore competition to the dental market.[36] Only in circumstances where there is no significant function remaining for an organization other than to repeat antitrust viola-

[34] The court stated on October 18, 1979, that the Commission "is unhampered by this Court's ruling of August 17, 1979 in fulfilling its mission in Docket No. 9118." But it added, "The findings of fact as found and the conclusions of law thereon are necessary for the relief sought." (IX 1000E–F) The full text of the October 18 order appears on pp. 124–25 of the Initial Decision.

[35] *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 98, 103 (1962); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 428 (1945).

[36] We take no position on the circumstances under which IFD might qualify as a "labor organization," except to note that respondent did not pursue or appeal the argument that its conduct was entitled to immunity from the antitrust laws under the "labor exemption."

tions, or in which a conduct order would not reasonably be expected to prevent repeating such violations or to restore competition, would a dissolution order be appropriate.

Our prior orders in analogous situations[37] have been intended principally to bar collective action by dentists which results in coercion of dental insurers in regard to the dentist-insurer relationship. Here, the principal anticompetitive result of IFD's conduct was to achieve a uniformity among its members in their dealings with insurers, *i.e.*, a concerted refusal to provide x-rays for claims review, thus disrupting insurers' cost-containment programs. More generally, respondent coerced these companies into operating in a certain way. Thus, we include provisions prohibiting activities which have the purpose or effect of collective refusals to submit **[56]** x-rays or more generally to coerce insurers or their employees to behave in a certain way. This latter provision would necessarily include insurers' choice of consultants and insurers' influencing consultants. This provision would not, however, prevent noncoercive communications between IFD and insurers regarding the manner in which insurers conduct their business. IFD remains free to urge third party payers to adopt or abandon certain practices, so long as it does so in a noncoercive way and avoids suggesting to its members that they refuse to cooperate with those payers that reject its advice.

We also include a provision prohibiting IFD from collectively attempting to influence patients not to choose particular dentists. This provision is justified on the basis of an incident in the record where a person acting for the benefit of IFD did influence a patient group directly by persuading an employer to stop listing dentists who cooperated with third-party payers (*see* CX 563B), as well as on the basis that this is a fencing-in provision which prohibits IFD from coercing insurers indirectly through influencing patient behavior. As such, it is reasonably related to the unlawful practices.[38] **[57]**

In order to make it clear that the order does not apply to dentists acting individually, we have provided that individual dentists may deal with insurers in the way each sees fit. We have also provided that this order does not prohibit IFD from adopting *bona fide* guidelines concerning the exposure of patients to radiation. IFD has not claimed that any of its activities challenged here were prompted by a concern that complying with the requests of third-party payers would expose dental patients to unnecessary radiation. What little evidence there is in the record indicates that the payers in Indiana request only

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[37] *See Indiana Dental Ass'n*, 93 F.T.C. 392 (1979); *Texas Dental Association*, Docket No. 9139 (Nov. 19, 1982) [100 F.T.C. 536].

[38] *See Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612–13 (1946); *Litton Industries* v. *FTC*, 676 F.2d 364, 370–71 (9th Cir. 1982); *Sears Roebuck & Co.* v. *FTC*, 676 F.2d 385, 391–92 (9th Cir. 1982); *American Home Products Corp.* v. *FTC*, No. 81–2930, slip op. at 45–50 (3rd Cir. Dec. 3, 1982).

x-rays that are necessary for diagnosis of the patient's condition and determination of an appropriate course of treatment, *i.e.*, x-rays that would normally be taken by the patient's dentist as part of good dental care.[39] Nevertheless, in order to avoid any misunderstanding as to the subject of this case or apprehension over the meaning of the order as it pertains to this issue, we have included a specific provision on this point.[40] [58]

Finally, we include notification and reporting requirements to insure that individual IFD members are aware of the Order and that the Commission may monitor respondent's compliance with other order provisions.

Final Order

This matter, having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondent Indiana Federation of Dentists,

It is ordered, That the Initial Decision of the administrative law judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist is hereby entered. [2]

I

It is ordered, That the following definition shall apply in this Order: *third-party payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any other organization, and any person who provides evaluative services in connection with any such reimbursement program.

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[39] Testimony of Connecticut General employee Chichester, Tr 396–97, 563–64.

[40] A misunderstanding of the proposed consent order in the Texas Dental Association case, Docket 9139 (Nov. 19, 1982) [100 F.T.C. 536], caused the Deputy Commissioner of the Food and Drug Administration to file a concerned public comment. He read the order in that case to require dentists to submit x-rays requested by insurers, even if that would mean exposing the patient to needless radiation. FDA's fears were relieved by the Commission's assurance that the order applies only to x-rays that already exist, and it does not prohibit the association from adopting professional standards concerning the appropriateness of taking x-rays. 47 Fed. Reg. 52993 (Nov. 24, 1982). Furthermore, neither that order nor the one we are issuing today pertains to the actions of dentists acting individually.

II

It is further ordered, That respondent, its successors or assigns, and its officers and representatives shall cease and desist from engaging in any activity, course of conduct, practice, or policy that in whole or in part:

A. Requests, urges, recommends or suggests that dentists, or has the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers; [3]

B. Compels, threatens, or coerces any third-party payer to operate or deal in any way in connection with dental health care benefits program; or

C. Has the purpose of causing or inducing consumers to choose dentists who do not cooperate with third-party payers, or influencing to any degree consumers' choice of dentists based on the degree or manner of non-cooperation between such dentists and any third-party payer or payers.

III

It is further ordered, That nothing contained herein shall be deemed: (1) to prohibit members of IFD, acting individually and not at the encouragement or inducement of IFD, from dealing with third-party payers in the way each sees fit; or (2) to prohibit respondent from adopting *bona fide* guidelines concerning the exposure of dental patients to radiation. [4]

IV

It is further ordered, That, within thirty (30) days after this Order becomes final, respondent shall mail to each of its members a copy of the Commission Order in this matter, as well as a letter, in the form shown as "Appendix A" to this Order, advising that respondent has abandoned all policies, guidelines, principles, work rules and statements that directly or indirectly request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers.

The letter shall further advise that dentists are free to choose to deal with any such programs and payers in such manner as they decide individually. Respondent shall also mail a copy of the Order and the letter to every person who joins respondent within three (3) years of the date of service of this Order; [5]

V

It is further ordered, That, within sixty (60) days after service of this Order, and annually on the anniversary date of the original report, for each of the five (5) years thereafter, respondent shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution or other action resulting in the emergence of a successor organization, which may affect compliance obligations arising out of this Order.

Commissioner Douglas did not participate.

APPENDIX A

(Respondent's Letterhead)

Dear Doctor:

As you may be aware, the Federal Trade Commission has issued an order against the Indiana Federation of Dentists. This order requires, in essence, that the Indiana Federation of Dentists cease and desist from certain activities that are concerned with dental health care benefits programs and cooperation by dentists with the administrators of such programs. The order also requires that you be sent a copy of the order and this letter.

You are hereby notified that the Indiana Federation of Dentists has abandoned all policies, guidelines, and principles that directly or indirectly request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to: (1) refuse to submit radiographs or other pre-treatment or post-treatment reports, analyses, and materials in response to a third-party payer's request for use in benefit determination; or (2) refuse to deal in any particular way with any one or more third-party payers. You are further notified that you are free to choose to deal with any such payers and programs in such manner as you decide individually.

A copy of the FTC's order is enclosed.

Sincerely,

_____

President

Enclosure

IN THE MATTER OF

MICHIGAN STATE MEDICAL SOCIETY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9129. Complaint, July 27, 1979—Final Order, Feb. 17, 1983

This Final Order, among other things, requires an East Lansing, Mich. medical society to cease from entering into agreements with its members to affect the amount, manner of calculating or terms of reimbursement for physical services; and to refrain from influencing its members to refuse to enter into any participation agreement not acceptable to the Society or its members; or to complete the claim forms used by any third-party payer. The Society is barred from entering, either on its own behalf or on behalf of its members, into any agreement with a third-party payer that concerns the amount, manner of calculation, or terms of reimbursement; and from influencing, by any means, a member's decision to accept or reject a participation agreement. The order also bars the Society from engaging in any action having the effect of coercing, compelling or inducing a third-party payer to accept the position taken by the Society regarding the terms or conditions of a participation agreement. Additionally, the Society is required to publish provisions of the order in a prescribed manner and to provide current and future members with a copy of the order.

Appearances

For the Commission: *Steven T. Kessel, M. Elizabeth Gee, Jill M. Frumin* and *Valorie P. Watkins.*

For the respondent: *A. Stewart Kerr, William A. Sankbeil* and *John L. Shoemaker, Kerr, Russell and Weber,* Detroit, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Michigan State Medical Society is a corporation formed pursuant to the laws of the State of Michigan, with its principal business offices at 120 W. Saginaw St., East Lansing, Michigan. Respondent is a professional association for Michigan

physicians. Approximately 8,700 physicians are members of respondent, constituting a substantial majority of Michigan physicians.

PAR. 2. Respondent charters component medical societies which are organized at the county level in the State of Michigan. Membership in respondent is a prerequisite to membership in a component society.

PAR. 3. Some members of respondent are engaged in the business of providing medical health care services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, some members of respondent have been and are now in competition among themselves and with other physicians. [2]

PAR. 4. Respondent is organized for the purposes, among others, of guarding and fostering its members' material interests and insuring that its members receive fair remuneration for services rendered. Respondent engages in activities which further its members' pecuniary interests. By virtue of such purposes and activities, respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. Third party payers for health care services that do business in Michigan, including Blue Cross and Blue Shield of Michigan ("BCBSM") and Michigan Medicaid, and some subscribers of BCBSM, are engaged in interstate commerce. The acts and practices described hereinbelow are in interstate commerce or affect the interstate activities of respondent's members, third party payers or some BCBSM subscribers, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. Respondent has restrained competition among physicians in the State of Michigan by acting as a combination of at least some of its members, or by combining or conspiring with at least some of its component societies or with at least some of its members, to:

A. Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services.

B. Engage in concerted action to restrict, regulate, impede or interfere with the health care cost containment or reimbursement policies of BCBSM or Michigan Medicaid.

C. Engage in concerted negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

PAR. 7. Respondent has engaged in acts and practices in furtherance of the combination and conspiracy, including among other things: [3]

A. Soliciting and collecting "proxies" from respondent's members which enabled respondent to collectively terminate such members' written agreements with BCBSM and Michigan Medicaid to provide medical services to persons who receive benefits from BCBSM or Michigan Medicaid, if BCBSM and Michigan Medicaid did not adopt reimbursement policies acceptable to respondent;

B. Engaging in concerted action against BCBSM which included, among other things, organizing a concerted refusal by members of respondent to deal with BCBSM.

C. Engaging in negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

D. Entering into an agreement with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

PAR. 8. The purpose, tendency and effect of the combination and conspiracy and of the acts and practices described in Paragraphs Six and Seven has been to:

A. Restrain competition among physicians in the State of Michigan.

B. Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services.

C. Deprive third party payers of the benefits of competition among physicians in Michigan.

D. Deprive subscribers and consumers of the benefits of third party payers' independently determined reimbursement policies or health care cost containment efforts.

PAR. 9. The combination and conspiracy and the acts and practices described in Paragraphs Six and Seven constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JUNE 19, 1981

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this case on July 27, 1979, charging the respondent Michigan State Medical Society ("MSMS") with engaging in unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Specifically, paragraph six of the complaint charged that respondent restrained competition among physicians in the State of Michigan by acting as a combination of at least some of its members, or by combining or conspiring with at least some of its component societies or with at least some of its members, to:

Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services; [2]

Engage in concerted action to restrict, regulate, impede or interfere with the health care cost containment or reimbursement policies of Blue Cross and Blue Shield of Michigan ("BCBSM") or Michigan Medicaid; and

Engage in concerted negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

In furtherance of the alleged combination and conspiracy, paragraph seven charged respondent MSMS with engaging in various acts and practices, including:

Soliciting and collecting "proxies" from respondent's members which enabled respondent to collectively terminate such members' written agreements with BCBSM and Michigan Medicaid to provide medical services to persons who receive benefits from BCBSM or Michigan Medicaid, if BCBSM and Michigan Medicaid did not adopt reimbursement policies acceptable to respondent;

Engaging in concerted action against BCBSM which included, among other things, organizing a concerted refusal by members of respondent to deal with BCBSM;

Engaging in negotiations with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM; and

Entering into an agreement with BCBSM with respect to the health care cost containment or reimbursement policies of BCBSM.

According to paragraph eight, the purpose, tendency and effect of the alleged combination and conspiracy and of the acts and practices described in paragraphs six and seven was to:

Restrain competition among physicians in the State of Michigan;

Fix, stabilize, or otherwise tamper with the fees which physicians in Michigan receive for their services;

Deprive third party payers of the benefits of competition among physicians in Michigan; and

Deprive subscribers and consumers of the benefits of third party payers' independently determined [3] reimbursement policies or health care cost containment efforts.

Respondent answered on September 19, 1979, denying the above

allegations, and also challenging other allegations concerning "commerce" and whether it is a corporation organized for profit. Respondent further asserted various affirmative and special defenses.

Prehearing conferences were held on September 4, 1979; March 27, 1980; and September 3, 1980.

Documentary discovery was conducted beginning in October 1979. Following completion of discovery, adjudicative hearings were held in Washington, D.C., and Detroit, Michigan in June, September, October and March, 1980. The trial produced a transcript record of 2041 pages and approximately 418 exhibits. The record was closed on January 12, 1981.

Proposed findings and reply findings were filed by the parties in February 1981.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, including the following, are used in this decision:

CX - Commission's Exhibit
RX - Respondent's Exhibit
The transcript of testimony is referred to with the last name of the witness and the page number or numbers upon which the testimony appeared.

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings: [4]

Findings of Fact

I. RESPONDENT MICHIGAN STATE MEDICAL SOCIETY

1. Respondent Michigan State Medical Society, a Michigan corporation, is a professional association for Michigan physicians with its principal offices in East Lansing (Complaint, Par. 1; Answer, Par. 1).

As of January 1978, the membership of MSMS totaled approximately 8700 physicians (CX 6; CX 15–Z–2). Over 80 percent of medical doctors practicing in Michigan are members of MSMS (CX 50–A).

2. The House of Delegates is the MSMS legislative body (CX 4–F, N). Its powers and duties include adopting rules and regulations to administer the affairs of MSMS and transacting all of the business of MSMS not otherwise specifically delegated (CX 4–N). The House of Delegates has authority to appoint committees, to receive their reports, and to act on them (CX 4–N; Hayes 324–25). The House of Delegates is composed of representatives elected by MSMS' local component societies, as well as by specialty sections of MSMS representing medical specialty groups (CX 4–M; CPF 15; *see also* Hayes 325). About 90 percent of the delegates attending the 1978 MSMS House of Delegates annual session were elected by the local component societies (CX 11–Z–41–44).

3. The House of Delegates meets annually (CX 4–N; Hayes 325). There have also been special meetings called to deal with matters requiring immediate consideration (Hayes 326–27; *see also* CX 4–N). At regular and special meetings the House of Delegates receives and acts upon proposed policy resolutions (CX 4–N–O; Hayes 325).

4. The Council is MSMS' executive body (CX 4–F, P). It is elected by the House of Delegates and has authority between House of Delegates meetings to act on behalf of MSMS and for the House of Delegates (CX 4–F; Hayes 327). The Council's functions include carrying out directives and resolutions enacted by the House of Delegates, acting on matters that arise between House of Delegates meetings which must be resolved prior to the next scheduled House of Delegates meeting, and monitoring the functions of various MSMS committees, including committees appointed by the Council or by the House of Delegates (Hayes 328).

5. MSMS charters component societies which are organized at the county level in Michigan. Membership in MSMS is a prerequisite to membership in a component society (Complaint, Par. 2; Answer, Par. 2). Component societies are distinct organizational entities and, subject to MSMS review, adopt their own constitutions and bylaws (CX 4–F–G; [5] *see, e.g.,* CX 309). Component societies conduct separate membership meetings (*see, e.g.,* CX 325). As of 1978, MSMS had 55 component societies (CX 6–Z–118).

II. SECTION 4 JURISDICTION

A. Activities of the Michigan State Medical Society

6. The Michigan State Medical Society was established in 1910 pursuant to Act No. 171 of the Public Acts of Michigan for 1903, entitled "Act for the Incorporation of Associations not for Pecuniary Profit" (CX 5–B–C).

7. The stated purposes of the Michigan State Medical Society are as follows: "to federate and to bring into one compact organization the entire medical profession of the State of Michigan and to unite with similar societies in other states to form the American Medical Association; with a view to the extension of medical knowledge and to the advancement of medical science; to the elevation of the standard of medical education, and to the enactment and enforcement of just medical laws; to the promotion of friendly intercourse among physicians, and to the guarding and fostering of their ["material", found in the 1910 Articles, was deleted by 1941] interests; and to the enlightenment and direction of public opinion in regard to the great problems of medicine, so that the profession shall become more capable and more honorable within itself, and more useful to the public in the prevention and cure of disease and in prolonging and adding comfort to life" (1941 Articles of Incorporation Extending Corporate Term, CX 5–J).

8. An additional purpose of MSMS is "To bring into one viable, effective organization the ethical physicians licensed to practice in Michigan in order that their contribution to human welfare will be enhanced" (June 1978 MSMS Constitution and Bylaws, CX 4–E).

9. In order to accomplish the above, the MSMS constitution provides that the organization will work to accomplish the following subpurposes: (A) to constitute, support and advise the American Medical Association in cooperation with similar societies of other states, in meeting its appropriate responsibilities; (B) to charter and organize constituant component medical societies; (C) to conceive, develop and administer health education programs designed to improve public understanding, awareness and acceptance of good medical standards, practices and concepts, as they relate to personal health, [6] scientific progress and society's advancement; (D) to stimulate advancement of the science and art of medicine and continually to seek to advance the medical, scientific, social, environmental, economic and medical political knowledge of its members in order that the doctor may better serve his patients and the public health generally; (E) to aid Michigan physicians individually and collectively in maintaining high levels of ethical conduct and standards of practice to protect and serve the

total public; (F) to provide medical leadership in meeting the health needs of the people by working with other medical and non-medical groups and individuals; (G) to preserve, protect and enhance physician-patient relationships, as basic to the delivery of quality health care; (H) to promote quality medical and health care by development and support of activities appropriate to this goal; (I) to advocate fair remuneration for services rendered; (J) to insure the adequacy of medical manpower by attracting capable people into the medical and health professions and to work toward the most effective distribution of their services; (K) to encourage medical students and physicians-in-training to participate in organized medicine in order to enable MSMS to be representative of all physicians; (L) to support the efforts of those who would preserve, protect and enhance the reputation and services of the medical profession; (M) to institute and provide specific services to meet the needs of the members; and (N) to foster and support continuing medical education (June 3, 1978 MSMS Constitution and Bylaws, CX 4–E).

10. The Scientific Assembly is one of the three major divisions of MSMS, and it is defined as "*** the convocation of its members for a presentation and discussion of subjects pertaining to the art and science of medicine and to the conservation of the health of the public" (June, 1978 MSMS Constitution and Bylaws, CX 4–E and F).

11. MSMS has the following standing scientific committees, which are called upon from time to time to study and develop programs dealing with specific diseases and problems such as: Committee on Aging; Committee on Blood Banks; Committee on Cancer; Committee on Cardiac Disease Control; Committee on Child Welfare; Committee on Diabetes Control; Committee on Highway Injury; Committee on Iodized Salt; Committee on Maternal and Perinatal Health; Committee on Mental Health; Committee on Occupational Medicine; Committee on Respiratory Diseases; Committee on Rural Medical Service; Committee on Venereal Disease Control (June, 1978 MSMS Constitution and Bylaws CX 4–S).

In pursuit of its goals, MSMS has been actively engaged in the following programs: [7]

1. *Continuing Medical Education*

12. The MSMS Commission on Continuing [Medical] Education ("CCME") was given the responsibility of developing standards for minimal continuing education requirements for doctors practicing in Michigan (CX 7–U). In May, 1974 it recommended (and the House of Delegates subsequently adopted) a program which would require 150 hours of continuing education over a three-year period (CX 7U and W).

13. Subsequently, the AMA provisionally authorized the CCME to review and accredit continuing education programs in Michigan (CX 7–U–V).

2. *Public Health Activities and Education*

14. MSMS participated in the National Immunization Month (October, 1973) by issuing news releases, broadcasting radio and television messages, holding news conferences, and printing posters to be hung in doctors' offices, in an effort to increase the level of immunization among Michigan citizens (CX 7–I).

15. MSMS was also involved in a pilot program (funded by a grant from the AMA) to improve medical care and health services in correctional institutions in four Michigan counties (CX–9V; CX 10–Y; CX 11–Z–5). In addition, it researched issues concerning the development of nuclear power in Michigan (CX 9–Z–15); broadcast radio programs regarding health issues (CPF 54); and distributed signs warning of the secondary effects of smoking (CX 9–X).

16. In 1974 and 1975, the MSMS Public and Environmental Health Committee took the following actions: Recommended that use of the Dri-dot Blood Test for gonorrhea be discontinued; worked on a new immunization reporting system between physicians, local health departments, and schools; studied the toxicology of the environment; and debated the role of public health medical practice. During this same time period, the Council approved the following recommendations of this Committee: that MSMS appoint a physician to serve as the Society's official representative to the Michigan Diabetes Association; that MSMS support efforts to eliminate the tuberculin skin test from the Michigan School Code; and that MSMS recognize the Michigan Heart Association guidelines for hypertension screening (CX 8–Z –13).

17. In addition, MSMS aided the State Department of Public Health in locating residents suffering from Reye's Syndrome, as part of a special disease control project (CX 9–Y); established a family planning training [8] program for physicians in rural areas (CX 9–V); lobbied against the legalization of laetrile (CX 11–Z–S); passed a resolution urging the President and Congress to consider implementing a recommendation of the National Academy of Science's Committee regarding the Veteran's Administration health care system (CX 11–Z–30).

3. *The Profession*

18. Pursuant to House of Delegates Resolution 73A–13, MSMS in 1974 voiced concern for the shortage of primary care physicians in Michigan: MSMS wrote letters to deans of medical schools, directors of training, and six hospitals with family practice residency programs,

and wrote letters to the Boards of Trustees of all Michigan hospitals, voicing this concern. MSMS also issued news releases, and speeches were given by MSMS officials, to encourage more physicians to train as primary care specialists (CX 7–H).

19. MSMS engaged in activities to aid physicians with alcohol and drug abuse problems (CX 9–Y, 9–Z–10, CX 145–C, CX 10–Z–18, CX 182–Z–3, CX 11–Z–12); conducted a seminar on the subject of better physician/patient relationships (CX 11–Z–13); and served on an advisory committee to the Michigan Health Data Corporation, to assist in the task of collecting data to evaluate the performance of Michigan hospitals.

4. *Maternal and Perinatal Health*

20. In 1974, the Committee on Maternal and Perinatal Health of MSMS was approached by the Michigan Department of Public Health and asked to consider the initiation of a family planning training program in rural areas. The Committee mailed questionnaires to physicians in various areas of the state to obtain information on current developments in family planning, and to create a format for dispensing family planning information (CX 9–Z–8–9).

21. The Committee also sponsored a conference on maternal and perinatal health, published and distributed desk reference cards for use by physicians and hospitals, sponsored a program for expectant parents and continued various studies and projects (CX 8–Z–10).

22. Committee discussions covered such topics as standards for perinatal nutritional care, fetal monitoring, maternal deaths from oxytocin, ectopic pregnancy deaths, etc. (CX 9–Z–13–14; CX 10–Z–21; RPF 59). In addition, the Committee studied maternal mortality in the state, perinatal morbidity and mortality and supported a Maternal Mortality Registry and a Placental Tissue Registry (CX 11–Z–[9]5). MSMS also arranged to have newborns covered by hospital insurance, and worked on a plan to screen newborns for diseases (CX 8–Z–10).

5. *Alcohol and Drug Abuse*

23. The MSMS Committee on Alcohol and Drug Dependency was instrumental in 1975 and 1976 in the implementation of the Public Intoxification Act and the development of regulations governing the operation of detoxification centers. The Committee also recommended that legislation be enacted making it illegal for physicians to dispense Schedule II Drugs from their offices in quantities larger than for one day's usage (CX 9–Z–10).

24. MSMS assisted in a month-long campaign on alcoholism, held in February of 1976 (CX 174–B).

6. *Eye Care*

25. The Committee on Eye Care in 1974–1975 considered at its meeting the following subjects: the Lion's Club Preschool Vision Screening Program, low vision clinics, opthamology referrals for rehabilitation, vision aspects of the Medicaid Program, eye care for trainable mentally retarded children, problems of coverage insufficiency, safety glasses for one-eyed amblyops, vision problems in low income areas, mobility of preschool and young children with severe vision impairment, and legislation to make school vision screening mandatory. During this time, the Committee on Eye Care also continued to serve in an advisory capacity to the Vision Section of the Michigan Department of Public Health's Bureau of Maternal and Child Health, and the Division of Services to the Blind of the Michigan Department of Social Services (CX 8–Z–10).

26. In 1975 and 1976, the Committee reviewed two proposed drafts for the Vision Section of the Medicaid Manual, studied the development of techniques for vision testing the mentally retarded and/or handicapped child, and developed guidelines for the treatment of tropias (CX 9–Z–12; CX 10–Z–20).

7. *Miscellaneous Programs and Activities*

27. The Committee on Aging drafted principles on improving care for the elderly, and also monitored federal and state legislation and programs pertaining to the elderly (CX 8–Z–9).

28. In October, 1975, the MSMS Committee on Highway Injury studied several bills pending before the Michigan Legislature concerning emergency medical service and other safety related issues (CX 9–Z–11). **[10]**

29. In 1975, the MSMS Ad Hoc Task Force on Public Health Statutes Revision Project ("PHSRP") was created by the MSMS Committee on State Legislation and Regulations to monitor the Public Health Statutes Provision Project. The Ad Hoc Task Force subsequently formulated MSMS responses to recommendations, and played a significant role in modifying the PHSRP Proposals as they were drafted into legislative form (CX 9–Z–5).

30. Pursuant to Resolution 75A–36, MSMS resolved to work closely with the Michigan Department of Health to upgrade and enforce existing guidelines for proper quality control of independent laboratories (CX 8–Z–25).

31. During May, 1975–1976, the Committee on Children and Youth accomplished the following: Agreed to work in cooperation with the Michigan Chapter of the American Academy of Pediatrics and the Michigan Perinatal Association toward the development of more in-

tensive care centers for infants in Michigan; recommended the development of a program in Michigan for the screening of newborns for disease (particularly congenital); endorsed the Right to Read Program; lent its support to efforts in the state to promote and provide educational programs on bicycle safety; and suggested that the Committee offer its counsel, when needed, to the Michigan Community Coordinated Child Care Council. The MSMS Council, during this same time period, approved recommendations of this Committee that MSMS support amendments to the Michigan Education Code to provide for the periodic re-evaluation of children enrolled in special education programs; and that MSMS support amendments to the Michigan Education Code to provide that children with scientifically documented learning disabilities, as well as physically handicapped and/or mentally retarded children, be eligible for special education programs under the Michigan Education Code (CX 9–Z–11).

32. Between May, 1975 and May, 1976 the Commission on Continuing Medical Education received provisional authorization to perform accreditation surveys within the State of Michigan by the AMA Council on Medical Education (CX 9–R).

33. During this period, MSMS was instrumental in getting the state legislature to pass a bill that defined death (CX 9–Y).

34. At this time an MSMS committee was appointed to respond to Mental Health Department Rules and Regulations regarding use of psychotropic drugs, and one set of such rules was amended pursuant to the review of this committee (CX 10–G). [11]

35. MSMS periodically informed its members of the possible legal ramifications of generic drug substitution (CX 10–G).

36. In the summer of 1977, the MSMS Committee on State Legislation and Regulations lobbied for MSMS regarding proposed Eye Bank legislation; laetrile legislation; a one-day, one-trial jury system; legislation on head and neck radiation-thyroid cancer; health and human sexuality education legislation; the New Public Health Code; legislation concerning patients' rights and responsibilities; legislation regarding dentists signing death certificates; and legislation dealing with a hospital construction moratorium (CX 182–H–I).

37. From May, 1977 to May, 1978, the MSMS Committee on CME Accreditation conducted 16 surveys, with seven hospitals receiving accreditations for the first time (CX 11–Z–4).

38. The MSMS Task Force on Medical Care Costs developed practical guides to assist hospital medical staffs in developing cost containment strategies and programs, helped the MSMS Committee on CME programming in developing a course on medical care costs for the 1978 MSMS Scientific Meeting, and maintained liaison with the

Michigan Medical School Council of Deans in developing programs on medical care costs for medical students (CX 189–H).

39. Pursuant to Resolution 78A–33, MSMS resolved to urge government hospitals to participate with private hospitals in making serious efforts toward cost containment; and further, that they share their cost performance data, and work toward greater public accountability (CX 11–Z–31).

40. Pursuant to Resolution 78A–57, the House of Delegates was directed to request component medical societies to investigate laboratory ownership arrangements and to take immediate action to assure that their physician members not be associated with any laboratory ownership schemes which may exploit patients (CX 11–Z–36).

B. Activities of MSMS Involving Pecuniary Benefit to Its Members

41. As noted in finding 7, *supra,* respondent MSMS is organized in part to further its members' pecuniary and business interests. To this end it engages in substantial activities or offers substantial services for [12] the economic benefit of its membership. One of its stated purposes is advocating fair remuneration for physicians' services. MSMS' activities and services include lobbying and legislative activities on bills having economic significance to members, intervening in or initiating lawsuits which affect members' pecuniary interests, close association with and control of organizations that further members' financial interests through the providing of services, public relations activities, practice management seminars, low-cost insurance programs, a variety of retirement plans, vacation package plans, continuing medical education courses which are available to MSMS members at a cost far below the charge to nonmembers, and a monthly magazine and newsletter dedicated in large part to reporting socioeconomic trends and furnishing economic advice.

1. *Corporate Purposes and Tax Status*

42. MSMS was founded and exists as a federation for all physicians licensed to practice in Michigan (CX 5–B; CX 4–E). One of the purposes for which MSMS was incorporated in 1910 was "the guarding and fostering of [physicians'] material interests" (CX 5–B). The MSMS Constitution, as amended in 1978, proclaims that one of the objects of the corporation is "to advocate fair remuneration for services rendered" (CX 4–E; CX 7–N). MSMS maintains in-house staff and facilities, including a Bureau of Economics, which engage in many of the activities or furnish many of the services described *infra* (*see, e.g,* CX 123–C).

43. MSMS is exempt from federal income taxation pursuant to

Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. 501(c)(6) (1976) (CX 141–C), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" with members that share common business interests (Treas. Reg. Section 1.501(c)(6)–1 (1958)), rather than under Section 501(c)(3) of the Code, which exempts organizations formed and operated solely for religious, charitable and scientific purposes, 26 U.S.C. 501(c)(3) (1976). MSMS members can deduct their MSMS dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (Treas. Reg. Section 1.162–1(a) (1958)).

2. *Lobbying and Efforts to Influence Government Action*

44. Respondent MSMS furthers its members' pecuniary interests by engaging in lobbying and legislative activity. MSMS actively and intensively lobbied for proposed legislation which increased Medicaid payments to physicians; which lowered the cost of professional liability insurance; which prevented [13] chiropractors from obtaining state licensure status[1] and which reduced physicians' state income tax liability.

45. At House of Delegates meetings from 1974 through 1978, Council Chairmen reported that one of MSMS' priorities for each year was pursuing legislative objectives to accomplish MSMS' goals (CX 7–Z–5; CX 8–S; CX 9–Z–2; CX 10–Z–7; CX 11–Z–1; CX 182–S). The importance to MSMS of its lobbying activities is apparent from the intricate network of committees, programs and registered professional lobbyists it has employed to carry out this function.

46. MSMS employs both an independent registered lobbyist (CX 173–J–K; CX 236) and a registered lobbyist/employee (CX 237; CX 6–B). MSMS expects its lobbyists to establish and maintain individual liaison with members of the Michigan Legislature, to attend sessions; to report back pertinent details; and to discuss MSMS' strategic options (CX 172–J–K; CX 46–C, F, I–J).

47. MSMS also has a Committee on Federal Legislation to monitor the activities of the U.S. Congress, and to advise MSMS members how legislation under consideration would affect the practice of medicine in Michigan (CX 9–Z–12; CX 8–Z–10; CX 11–Z–13–14). Lobbying for or against federal legislation is managed through the American Medical Association's Washington office (CX 9–Z–12), with input from MSMS (CX 187–C; CX 133–B; CX 11–Z–5; CX 10–Z–20; CX 9–Z–12, U; CX 8–Z–7).

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[1] This latter measure would have effectively enlarged the areas of medical treatment in which they could compete with physicians. MSMS approved the final legislative version which removed proposed language giving chiropractors the right to perform physical examinations; the right to perform incisive surgical procedures or invasive procedures requiring instrumentation; and the right to dispense or prescribe drugs (CX 10–Z–23; CX 57–B; CX 46–C; *see* CX 8–Z–5, Z–15).

48. MSMS lobbied energetically in 1975 and later to obtain higher reimbursement for physicians' services under the Medicaid program (CX 8–Z–15; CX 10–Z–23; CX 11–Z–6, Z–20, Y). In 1977, MSMS claimed that as a result of this lobbying, it had succeeded in increasing Medicaid reimbursement for 80 percent of all physicians' Medicaid services (CX 11–Y; *see also* CX 11–Z–20, Z–6). "This accounts for over 80% of the total Medicaid payout" (CX 88–B).

49. MSMS launched a major legislative drive in 1974 to lower the cost to its members of professional liability insurance (CX 7–N; CX 8–U, 8–Z–6, Z–7, Z–15, Z–17, Z–18, Z–20, Z–[14] 22, Z–23; CX 9–Z–16). Beginning in 1974, the cost of professional liability insurance to Michigan MDs increased sharply, and many MSMS members were in danger of losing their insurance coverage entirely (CX 7–I, Z–5, Z–6; CX 8–U, 8–Z–6, Z–7, Z–17; CX 32–B, J; CX 177–F).

50. MSMS' then President stated that "[t]he MSMS Council, our Committee on Professional Responsibility, and our staff all rate [this] malpractice situation as our *No. 1 MSMS priority*" (CX 32–B) (emphasis in original). During the first half of 1975, "[t]he Legislature enacted 15 professional liability bills which MSMS either conceived or supported" (CX 233–A).[2] MSMS encouraged legislation to protect members' livelihoods by making it more difficult for patients to sue physicians for malpractice (CX 233–A). For example, MSMS proposed legislation to require that prior to filing a medical malpractice lawsuit, a complainant file an "Affidavit of Merit" signed by an expert witness attesting to the merit of the claim (CX 8–V, Z–23; CX 9–Z–1; CX 10–Z–2; CX 233–A; CX 8–Z–18). MSMS also sought and obtained a statutory definition of medical malpractice, which made it more difficult for plaintiffs to prevail, by differentiating malpractice from maloccurrence or poor result (CX 9–Z, Z–7, Z–20; CX 10–F, Z–2, Z–23; CX 11–Z–5, Z–20; CX 96–B; CX 97–C–E; CX 177–N–O). MSMS lobbied for professional liability legislation, which was subsequently enacted, and which included a statutory definition limiting the class of those qualified to testify as an expert witness in medical malpractice lawsuits to a "Doctor of Medicine [or] Osteopathy who is actively engaged in the practice of medicine or surgery, in the particular specialty or field involved." The legislation specified that the "Doctor must spend most of his time in clinical practice in that specialty, and in the same *locale* as the defendant physician" (emphasis in original) (CX 9–Z–21; *see also* CX 9–Z; CX 177–N; CX 10–F). A fixed statute of limitations for medical malpractice was also established (CX 8–V, Z–18, Z–23; CX 9–Z, Z–7; CX 10–Z–2; CX 233–B); as well as a requirement for binding arbitration (CX 8–V, Z–18, Z–23; CX 9–Z; CX 10–Z–41; CX 233–B); a

[2] MSMS legal counsel drafts legislation for MSMS which legal counsel considers "[o]ne of the most important things [they] do" for MSMS (CX 77–C; *see also* CX 8–V).

prohibition against contingency fees for attorneys (CX 7–Z–20; CX 8–V, Z–23; CX 233–B); and a requirement that medical malpractice claimants disclose all sources of collateral income (CX 8–V, Z–18).

51. MSMS was active in the successful effort to amend the Michigan Single Business Tax statute, thus enabling physicians to decrease their state income tax liability (CX 96–A; CX 97–C, F; CX 9–Z–31, Z–32; CX 10–Z–23, Z–41). MSMS also [15] claimed that it had a significant impact on the defeat of "Proposition D," for a graduated state income tax. "Efforts to defeat Proposition D were led by the Committee against Higher Taxes, which MSMS members, more than any other group, help to finance" (CX 57–G).

52. MSMS also lobbied to protect its members' economic interests by pursuing and obtaining legislation which immunized physicians from lawsuits arising from performance as a "Good Samaritan" during an emergency situation occurring in a hospital (CX 233–C; CX 8–V), or from serving on a peer review committee (CX 233–C; CX 8–C, Z–23; CX 9–Z–1; CX 77–C).

3. *MSMS Involvement with Michigan Doctors Political Action Committee*

53. MSMS also furthers its members' pecuniary interests by pursuing its legislative objectives through the Michigan Doctors Political Action Committee ("MDPAC"). Organized by MSMS, and still closely affiliated with it, MDPAC complements MSMS' legislative efforts by contributing money to political campaigns in order to elect "friendly legislators".

54. MSMS itself cannot legally contribute money to support political candidates of its choice (CX 9–U), but MDPAC can and does contribute to political campaigns (CX 217–B; CX 9–U; CX 10–U). MSMS believes that "[o]nly by supporting *and* electing friendly legislators can [it] get friendly legislation" (emphasis in original) (CX 9–U; *see also* CX 110–U; CX 46–H; CX 217–B).

55. MDPAC holds its annual meeting at MSMS headquarters (CX 21–D). MDPAC's chairman, an MSMS member, reports to the MSMS House of Delegates annually (CX 6; CX 9–U; CX 10–U–V; CX 11–M). MDPAC holds its annual membership luncheon while the House of Delegates is in session (CX 242). Those who attend the membership luncheon are virtually all MSMS Delegates (CX 242). MSMS and MDPAC also co-sponsor an annual congressional reception in Washington, D.C., which enables MSMS members to meet their congressmen and to discuss legislative matters of importance to MSMS members (CX 52–D; *see* CX 9–X; CX 133–B).

56. MSMS raises money for MDPAC's candidate funding activities by soliciting contributions to MDPAC (CX 95–B; CX 96–B; CX 129–A;

CX 155–B). When MSMS members receive their annual dues billing, the statement includes a MDPAC contribution request (CX 96–B; CX 129–A; 155–B). MSMS also includes requests for contributions for MDPAC in its monthly magazine (CX 72–M–N) and biweekly newsletter (CX 95–B; CX 129–C–D). The Chairman of MDPAC solicits contributions from MSMS members during his annual presentation at the MSMS House of Delegates meetings (CX 9–U; CX 10–U–V). **[16]**

4. *Litigation*

57. MSMS initiated a lawsuit to prevent BCBSM from reducing its outpatient psychiatric benefits (CX 136–B). BCBSM's proposed actions would have reduced payments to MSMS physicians for these services. In 1978, MSMS also intervened in a lawsuit between BCBSM and Michigan's Insurance Commissioner because the outcome of the lawsuit could have affected rates of reimbursement to physicians. A decision favoring MSMS' position was rendered. MSMS legal counsel claimed that the decision in the case was "a victory for physicians" and that it would have "a favorable impact on our other litigation against BCBSM, particularly the psychiatric suit" (CX 136).

58. In March 1978, the MSMS Council authorized a direct payment of $11,000 to help pay the expense of another physicians' professional organization which was involved in a dispute with BCBSM over differential reimbursement to participating and non-participating physicians. MSMS' Council believed that this expenditure would assist MSMS' legal counsel in carrying on its own lawsuit to prevent BCBSM from instituting a policy of differential payments to physicians (CX 187–F; CX 114–E; CX 11–U).

59. MSMS filed an *amicus curiae* brief before the U.S. Supreme Court in *Group Life and Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), because the case involved "the extent to which Blue Cross-Blue Shield organizations may fix prices and discriminate against non-participating professionals free of antitrust liability" (CX 136–B; *see* CX 187–E; CX 191–F; CX 11–U).

60. MSMS legal counsel also filed an *amicus curiae* brief on behalf of a physician accused of malpractice who was countersuing the plaintiff's attorney for malicious prosecution (CX 136–B; CX 189–D; CX 190–D; CX 191–F).

5. *Professional Liability Insurance*

61. MSMS has advanced the economic interests of its members through the creation, funding and control of Michigan Physicians Mutual Liability Insurance Company ("MPMLC"). MPMLC sells professional liability insurance to physicians, including MSMS members, at low rates (Finding 64, *infra*).

62. In 1975, amidst MSMS' concern regarding the malpractice crisis (Finding 49, *supra*), MSMS created MPMLC (CX 8–U, Z–3; CX 9–T–U; CX 10–V–W; CX 38–A). MSMS invested over $200,000 to help finance MPMLC (CX 12–S; *see* CX 9–J; CX 171–D; CX 177–J; CX 178–I; CX 10–V). "Approximately $20,000 of that money has remained as an investment of the society in MPMLC—the amount of money that we do not intend to retrieve and will not retrieve" (CX 12–S; *see also* CX 171–D). [17]

63. MSMS controls MPMLC. The Michigan Bureau of Insurance required that MPMLC's original incorporators be MSMS members (CX 8–Y; CX 235–A; CX 6). During 1976 and 1978, the overwhelming majority of the MPMLC board of directors were MSMS members (CX 231; CX 6; *see* CX 10–V). MPMLC's officers have consistently been MSMS members (CX 6; CX 231; CX 9–R–U; CX 10–V–W; CX 11–O–P), including MPMLC's President from 1976–1978, Vernon V. Bass, MD, who also served as President of MSMS during 1978 (CX 6; CX 9–T; CX 10–V; CX 11–O; CX 231). MPMLC's President reports annually to the MSMS House of Delegates (CX 9–T–U; CX 10–V–W; CX 11–O–P). An MSMS employee maintains "official liaison" with MPMLC (CX 177–F). MSMS features current MPMLC news articles in its biweekly *Medigram* (CX 88; CX 155–B; CX 38–A).

64. MPMLC provides Michigan physicians with malpractice insurance (CX 10–V; CX 11–O; CX 38–A; CX 88–A; CX 177–F) at low rates (CX 10–V; CX 11–O). As MPMLC President Bass told the 1978 House of Delegates, "You have every right to be proud of your Michigan Physicians Mutual Liability Company. Its superb board of directors are now considered insurance executives with a physician's heart and empathy. It is a management company that is extremely responsive and an effective organization" (CX 11–O).

6. *Publications*

65. Both *Michigan Medicine,* the "Official Journal of the Michigan State Medical Society" (CX 58–A; CX 64–A) and Michigan/Medicine *Medigram,* MSMS' biweekly newsletter (CX 27–I), publish articles with a special emphasis on legislation, economic issues and medical news in Michigan (CX 11–Z–8; CX 9–V, Y, Z–5).

66. At its August 2, 1975, meeting, the MSMS Council responded to membership demand for socio-economic and news articles, in lieu of scientific news, by resolving that *Michigan Medicine* should no longer carry any scientific articles and that the position of Scientific Editor should be eliminated (CX 9–Z–17, Z–18; CX 171–B–C; CX 58–B). MSMS members reacted very favorably to the Council's actions. In response to an MSMS survey of 400 members, "83.7% of those responding said they prefer the news-magazine rather than the former

scientific publication" and "[t]he respondents said they rate CME, government programs, legislation, and legal advice as the four most important topics" (CX 10–Z–22).

67. *Michigan Medicine* publishes a variety of monthly columns which contain legal, economic and business advice for members (*see, e.g.,* CX 64–C, 66–C). For example, in one issue of *Michigan Medicine,* MSMS legal counsel advised members about the professional and economic dangers of practicing without malpractice insurance (CX 64–C). An article in another issue advised members on the costs and advantages of incorporating their medical practices (CX 66–C). [18]

7. *Public Relations and Membership Services*

a. *Public Relations*

68. The public image of physicians is a vital concern of MSMS because most physicians rely on the public as their source of income, and because physician-patient relationships are dependent on the trust and respect accorded both to an individual physician and to the profession as a whole (*see* CX 10–Z–22; CX 9–Z–17). The MSMS Constitution proclaims that one of MSMS' purposes is "to support the efforts of those who would preserve, protect and enhance the reputation of *** the medical profession" (CX 4–E; *see also* CX 5–B; CX 7–N). To fulfill this purpose, MSMS set up a Committee on Public Relations (CX 7–N; CX 10–Z–22), and hired a public relations consultant (CX 10–Z–22).

69. MSMS used public relations to solicit support for the MSMS activities challenged in this case. In 1977, MSMS encouraged members to distribute to patients an MSMS-produced brochure explaining MSMS' reaction to BCBSM's new reimbursement policies (CX 184–F–G; CX 95–A). MSMS hoped to win public support for its position and thereby pressure BCBSM to be more responsive to MSMS' demands. The House of Delegates also developed a "detailed set of recommendations" for MSMS leaders handling media and public inquiries about MSMS' actions regarding BCBSM (CX 11–Z–19).

70. MSMS' public relations activities reinforced its legislative lobbying efforts regarding malpractice. During its intensive public relations campaign in 1975, MSMS spent approximately $31,000 on advertising in order to "solicit public support for [MSMS'] legislative package" (CX 8–V–W). MSMS believed that if every MSMS member launched a "concerted effort to generate support and help from the public" for MSMS' legislative package, they could lower the cost of professional liability insurance (CX 34–A–C; CX 8–V–W; CX 8–Z–6, Z–7).

b. *Member Services*

(i) *Practice Management and Physician Service Group*

71. Respondent MSMS advances its members' economic interests by offering them a wide variety of money-saving practice management programs to increase the efficiency, productivity and profitability of their practices. The Physician Service Group ("PSG"), a wholly-owned, for-profit MSMS subsidiary, currently provides this service for MSMS members.

72. MSMS has advised physicians on financial management and the business side of practice through [19] publications, seminars and workshops (CX 66–C; CX 9–Z–5; CX 11–Z–7; CX 21–C; CX 11–Z–19, Z–20; CX 10–Y). MSMS members pay less to attend these workshops and seminars than non-members (CX 52–A).

73. MSMS has advised physicians on the financial aspects of opening a practice, office set-up, personnel management, streamlining paperwork, billing and collecting fees, patient flow, methods of obtaining referrals and the advantages or disadvantages of incorporating a medical practice or entering a partnership (CX 52–A; CX 126–A; CX 204–A, F, H–K).

74. In July 1978, the MSMS Council became concerned that MSMS was endangering its tax-exempt status by providing services to members which were turning a profit for MSMS (CX 141–C–D). MSMS also perceived an "increasingly critical Internal Revenue Service attitude toward the 501(c)(6) tax exempt status of organizations such as MSMS engaging in activities 'unrelated' to the incorporated purpose of the organization" (CX 141–C; CX 190–H). Council members, officers, staff and legal counsel discussed various MSMS options for providing "membership services outside of the clearly established tax-exempt scientific and socio-economic needs and services of [MSMS]" (CX 141–C; *see also* CX 190–H). PSG, a wholly-owned for-profit subsidiary was therefore established (CX 12–S–T; CX 190–H; CX 141–C–D).

75. MSMS controls PSG. MSMS' legal counsel drafted PSG's Articles of Incorporation and the Council approved them (CX 190–H). PSG was capitalized with funds contributed by MSMS (CX 12–R–T). MSMS owns all outstanding shares of PSG stock, approximately a $50,000 investment (CX 12–S–T; CX 141–C). PSG's offices are located in the MSMS headquarters building (CX 141–C). MSMS members and employees serve as PSG's officers and Board of Directors (CX 6; CX 141).

76. PSG offers a wide variety of services, including many previously provided by MSMS, to MSMS members which inure to their financial benefit. For example, PSG offers members a credit card office payment plan at a group discount rate which assists physicians in saving money by cutting billing costs and reducing the number of uncollecti-

ble accounts (CX 161–B). PSG also offers MSMS members a bill collection service to help physicians collect delinquent accounts (CX 141–D). This service costs MSMS members less money than would using an independent bill collection service (CX 218–A). Other PSG services available to MSMS members include private financial and estate planning, loans to physicians, practice management consultations and practice management seminars (CX 141–D; CX 152–H).

(ii) *Insurance Programs for Members*

77. MSMS offers its members insurance programs such as disability (CX 223; CX 61–C; CX 8–Z–11), group term and **[20]** permanent life (CX 226; CX 58–C; CX 8–Z–11; CX 9–Y), workers' compensation (CX 74–C), office overhead protection (CX 225), and hospital, surgical and major medical insurance plans (CX 102–C; CX 229–A–D; CX 127–B; CX 178–D; CX 8–Z–11; CX 11–Z–16). MSMS considers these insurance programs to be a valuable benefit of membership (CX 58–C; CX 74–C; CX 61–C; CX 102–C) because they provide "broad insurance protection at low net cost" for enrolled members (CX 74–C). Three of the MSMS-sponsored insurance programs pay MSMS members annual dividends (CX 225–A; CX 58–C). During 1975, the MSMS-sponsored group term and permanent life insurance program paid enrolled members more than $80,000 in dividends (CX 9–Y).

(iii) *Retirement Plans*

78. MSMS established a pension trust fund in 1978 after a membership survey demonstrated members' interest in such a fund (CX 186–E; CX 190–G; CX 11–V). The MSMS pooled pension trust fund is especially valuable for members who have no pension plan because these physicians can enroll in any one of the variety of MSMS plans without spending any money on the legal or accounting costs ordinarily associated with adopting such a plan (CX 189–F). The MSMS pension trust fund also enables members with an existing "Keogh or P.C. retirement plan" to switch easily to an MSMS plan (CX 189–F).

(iv) *Auto Leasing and Discount Rental Programs*

79. MSMS has arranged for "significant discounts" to MSMS members in renting or leasing a car or truck (CX 97–G; CX 227–A, C; CX 143–C; CX 227–A–B, D–G).

(v) *Continuing Medical Education*

80. MSMS offers continuing medical education courses for physicians (CX 9–V, Z–11, Z–12; CX 10–Z–12, Z–13; CX 43–A; CX 52–D), at a lower cost to MSMS members than to non-members (CX 182–J; CX 88–B; CX 89–A; CX 90–A; CX 189–G; CX 216–A).

(vi) *Vacation Plans*

81. MSMS members who join an MSMS-sponsored travel tour enjoy the "charter cost savings" of a group vacation package (CX 148–C; CX 86–A).

8. *Relationship with American Medical Association*

82. American Medical Association ("AMA") engages in substantial activities for the pecuniary benefit of its [21] members.[3] Membership in a constituent society of AMA is a prerequisite to membership in AMA.[4] MSMS is a constituent society of AMA (CX 5–B, J; CX 4–E). Membership in MSMS makes physicians eligible for membership in AMA.

III. INTERSTATE COMMERCE

83. MSMS members receive substantial amounts of money which move across state lines as reimbursement for physicians' services covered under the Medicaid program and the Federal Employees Health Benefits Program ("FEHBP") (Finding 84, *infra*).

84. In fiscal 1977, Michigan Medicaid paid $110,585,629 for physicians' services covered by Medicaid. In fiscal 1978, Michigan Medicaid expenditures for reimbursement to physicians totaled $119,268,000 (Dempsey 1774). For each of those years the Michigan Department of Social Services drew half of the amount of total physicians' services expenditures from federal funds in Washington, D.C. (Dempsey 1777; CX 728–B, ¶ 4). During the years 1977 and 1978, BCBSM paid $30 million annually in reimbursement for health benefits, including physicians' services, under FEHBP contracts covering 36,000 federal employees in Michigan (Hustead 879–80, 871–72). All of these funds flowed across state lines from Illinois (location of the bank of the National Association of Blue Cross and Blue Shield Plan, *see* Finding 97, *infra*), into Michigan.

85. As noted earlier, Finding 1, *supra,* as of March 1975, over 80 percent of the physicians in Michigan were members of respondent MSMS (CX 50–A). As licensed physicians, MSMS members regularly purchase and prescribe drugs and other medical products (*see, e.g.,* CX 95–C–D).

86. Michigan physicians purchase significant amounts of drugs and other medical products directly from manufacturers in other states. The amount of money involved in these transactions is substantial. For example, Bausch & Lomb, Inc., a New York company which sells

[3] *American Medical Ass'n,* 94 F.T.C. 701, 987 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980).

[4] *Id.* at 710.

its products directly to physicians, had sales in Michigan in 1979 of $4.2 million (CX 728–E, ¶¶ 15–16). Hoechst-Roussel Pharmaceuticals, Inc., a New Jersey company which sells directly to physicians, had 1979 sales in Michigan of approximately $4.6 million (CX 728–F, ¶¶ 21–22). [22]

87. Because MSMS members prescribe drugs and the use of other medical products, their prescription patterns necessarily affect sales of drugs and other medical products to Michigan purchasers, such as pharmacies, who are not physicians.

88. Manufacturers of drugs and other medical products located outside of Michigan sell significant amounts of their products to Michigan purchasers other than physicians. The amounts of money involved in these interstate transactions are substantial. For example, Astra Pharmaceutical Products, Inc., manufactures its products in Massachusetts and sells its prescription drugs to wholesale supply houses in Michigan; its sales into Michigan in 1979 totaled $980,755 (CX 728–D, ¶¶ 10, 12–13). A. H. Robins Co., Inc., a Virginia manufacturer selling directly to wholesalers, hospitals and retailers, has annual sales in Michigan in excess of $5 million (CX 728–E, ¶¶ 17–19). Burroughs Wellcome Co., a North Carolina manufacturer which sells its products to clinical laboratories in Michigan, had sales in Michigan in 1979 of approximately $9 million (CX 728–F, ¶¶ 23–25). The Purdue Frederick Co., a New Jersey manufacturer selling pharmaceutical products to hospitals, and medical supply wholesalers and retailers, had sales in Michigan in 1979 in excess of $1 million (CX 728–G, ¶¶ 26–28). Becton Dickinson and Co., a New Jersey manufacturer which sells to health care facilities and distributors in Michigan, had sales in Michigan in 1979 of $6,214,066 (CX 728–G–H, ¶¶ 29–30, 32).

89. Under the Medicaid program the federal government pays 50 percent of the cost of Medicaid payments for physicians' services in Michigan (CX 728–B, ¶ 3; CX 728–A, ¶ 1). In fiscal 1977, Michigan Medicaid paid $110,585,629 for physicians' services covered by Medicaid. In fiscal 1978, Michigan Medicaid expenditures for reimbursement to physicians totaled $119,268,000 (Dempsey 1774). For each of those years the Michigan Department of Social Services drew half of the amount of total physicians' services expenditures from federal funds in Washington, D.C. (Dempsey 1777; CX 728B, ¶ 5).

90. FEHBP is a general health insurance plan under which the federal government, through the Office of Personnel Management ("OPM"), contracts with a number of insurers to provide health benefits for federal employees and their dependents (Hustead 854–55).

91. FEHBP enables federal employees and their dependents, wherever located in the United States, to take advantage of the service

benefits offered by Blue Cross and Blue Shield plans (Hustead 854, 859). OPM arranges for the provision of these benefits through a contract with the National Association of Blue Cross and Blue Shield Plans ("NABCBSP"), an umbrella organization consisting of all the local Blue Cross and Blue Shield plans in the nation (Hustead 867–68). (OPM's contract with NABCBSP for FEHBP Blue Cross-Blue Shield benefits is hereinafter referred to as the "OPM contract.") [23]

92. The OPM contract provides standardized benefits. This means that FEHBP offers identical Blue Cross and Blue Shield health insurance coverage to all federal employees nationwide (Hustead 863). Under NABCBSP's service benefit plan, an employee may choose either high option or low option, and within each of those categories, he or she may choose either self-coverage or family coverage (Hustead 863). All employees electing the same option make the same premium payments and receive the same benefits, regardless of where they are located (Hustead 863).

93. Under the OPM contract, each local Blue Cross and Blue Shield plan pays for benefits, including those for physicians' services, rendered to federal employees in its plan area (Hustead 870–71, 868).

94. When BCBSM pays Michigan physicians for services covered under the OPM contract, NABCBSP reimburses BCBSM for the expenditures with funds sent to Michigan from NABCBSP's bank in Chicago, Illinois (Hustead 868, 872–73). The amount of NABCSP's reimbursement payments is substantial. During the years 1977 and 1978, NABCBSP paid BCBSM $30 million annually in reimbursement for health benefits, including physicians' services, under contracts covering 36,000 federal employees in Michigan (Hustead 879–80, 871–72).

95. Because the FEHBP premium rate is based on benefits expenditures and the rate is uniform for all subscribers wherever located, changes in BCBSM benefit payments to Michigan physicians affect the premiums paid to NABCBSP's bank in Chicago, both by the federal government and by federal employees under FEHBP.

96. Under the terms of OPM's contract with NABCBSP, a uniform standardized premium is paid for federal employees throughout the country with Blue Cross and Blue Shield coverage under FEHBP (Hustead 863). In their annual calculation of this nationwide premium rate, NABCBSP and OPM consider the total of expenditures by all participating Blue Cross and Blue Shield plans (including BCBSM) over the past year for all enrolled federal employees and estimate total expenditures for the upcoming year. From this data, NABCBSP and OPM establish an average uniform per capita premium rate (Hustead 875–76; Reveley 663). Each covered employee pays about 40

percent of this premium, and the federal government pays the remainder (Hustead 865).

97. OPM collects the federal employees' share of the premium for Blue Cross-Blue Shield coverage through payroll deductions at local payroll offices located throughout the world (Hustead 867, 872). OPM transfers these premium payments to Washington, D.C. (Hustead 872), then sends the employees' [24] contribution, combined with the federal share of the premium, to the Continental Bank in Chicago, Illinois (Hustead 865, 873).

98. A change in benefit payouts by an individual state or regional Blue Cross and Blue Shield plan, including BCBSM, affects the calculation of total nationwide expenditures by participating plans, and thereby affects the uniform nationwide premium rate. A change in the uniform nationwide premium rate is reflected in the amount of premium payments paid by OPM and by all federal employees with Blue Cross and Blue Shield coverage (Hustead 876–79, 865; Reveley 664–65).

99. Changes in BCBSM reimbursement payments to Michigan physicians affect the per capita premium costs for employees in states other than Michigan who receive Blue Cross and Blue Shield benefits under the more than 125 national accounts contracts with equalized rates in which BCBSM participates (Reveley 643, 649). With equalized rates, the premium paid by each employee is based on total benefit expenditures and a single rate is charged regardless of the state in which the employee lives (Reveley 648–649). Examples of such national accounts are Ford Motor Co., K-Mart and the Budd Company (Reveley 661).

100. A national account is an interstate agreement among Blue Cross and Blue Shield plans to provide service benefits to a single group of subscribers whose members reside in more than one state or other geographic area (Reveley 649, 643).

101. Of 250 national accounts in which BCBSM is involved, more than 125 of them use the "equalization" mechanism for determining per capita premium rates (Reveley 648–49).

102. In those national accounts using the equalization mechanism, changes in benefits payments by any of the Blue Cross and Blue Shield plans participating in the account affect the calculation of the nationwide equalized premium rate.[5] The amount of money paid for benefits under these national accounts is substantial. Of the approximately $186 million paid in total [25] Blue Shield benefits for em-

[5] If one state has a greater proportion of covered employees than other states, changes in benefits payments for that state will have proportionately greater impact on the equalized rate (Reveley 649). In the Ford national account, for example, approximately 63 percent of the Ford employees with Blue Cross-Blue Shield coverage are located in Michigan and are enrolled through BCBSM (Reveley 657). As of December 1977, the Ford national account covered 330,710 persons in Michigan, including employees and their dependents (CX 661–F; Revely 654).

ployees and their dependents covered under the Ford national account in 1978, BCBSM paid approximately $77 million on behalf of Ford employees and their dependents in Michigan (Reveley 660–61).

103. Changes in reimbursement payments by BCBSM to Michigan physicians increase or otherwise affect the cost to automobile manufacturers of BCBSM health benefits policies purchased on behalf of Michigan employees. This, in turn, affects the amount remaining to pay wages and benefits other than health care for all automobile company employees, including those who reside in states other than Michigan (Glasser 504, 566).

104. The United Automobile Workers union ("UAW") negotiates national contracts with Ford, Chrysler, and General Motors covering these companies' employees in 34 states, including Michigan. The benefits paid out to UAW members under these contracts, including benefits for health care, are part of a collective bargaining agreement (Glasser 561–62, 598, 609, 611).

105. BCBSM has contracts with Ford, Chrysler and GM for the providing of most of the bargained health benefits, including the cost of physicians' services, to UAW members in the State of Michigan (Glasser 537–38, 560).

106. Occurrences that increase or otherwise affect payments for physicians' services by BCBSM on behalf of UAW members affect the amount of money available for other benefits and wages of all UAW members employed nationwide by Ford, Chrysler, and GM.[6]

107. Contacts between MSMS officials and representatives and parties in other states provided MSMS with knowledge and experience to assist respondent in engaging in the acts and practices challenged in the complaint. For example, MSMS developed the concept of its Division of Negotiations based upon contacts with and guidance from the AMA Department of Negotiations (*see, e.g.,* CX 10–P; CX 75–D; **[26]** CX 177–S–T).[7] MSMS members also traveled interstate to attend meetings and seminars related to negotiating activities (CX 10–Z–4; CX 10–Z–3; CX 9–X; CX 411–A–J), and made attempts to influence policies of medical societies in other states in order to strengthen MSMS' position against third-party payers in Michigan (*see, e.g.,* CX 97–A).

108. Proxy and departicipation solicitation as well as actual departicipation were arranged in part through the mail, and MSMS continually informed members of its efforts in this direction in MSMS publications which are also sent through the mail (*see, e.g.,* CX 392;

[6] It may also be that increased costs of UAW members' health care coverage may result in an overall increase in automobile manufacturers' labor costs. If so, to the extent that labor costs are reflected in the price of automobiles, increased health care costs may mean that the price of automobiles sold in interstate commerce is increased.

[7] The AMA has its headquarters in Chicago, Illinois (CX 95–D).

425; 398–A–K; 372–A–B; 2–A–B; 330; 337; 352; 324–A; 325–A; 488–90; 490–94; 296–301; 108–C–F; 152–B, G; 69–C; 130–B; 131–A–C).

IV. THIRD-PARTY REIMBURSEMENT FOR PHYSICIANS' SERVICES IN MICHIGAN

A. *Blue Cross and Blue Shield of Michigan*

109. BCBSM is a third-party payer for health care services. It provides hospital and medical care benefits to individual and group subscribers (Hayes 329–33; CX 249; *see, e.g.,* CX 229–K–N). Annually, BCBSM pays out several hundred million dollars in benefits payments to compensate for services performed by physicians (*see, e.g.,* CX 462–Z–33).

110. Blue Cross of Michigan and Blue Shield of Michigan were originally separately incorporated. However, they merged in 1975 to form BCBSM (Hayes 361–62). From 1940 to 1970 the MSMS House of Delegates elected Blue Shield of Michigan's Board of Directors. In 1970, the House of Delegates enacted a resolution severing its relationship with Blue Shield of Michigan, giving up the right to select directors (Hayes 315–317).

111. BCBSM's subscribers include Michigan members of the UAW and their families (Glasser 488). As of 1979, BCBSM's UAW subscribers numbered between 1.6 and 1.8 million people (Glasser 487).

112. In the latter part of the 1960's, BCBSM formed a committee to develop a new benefit program, because the fixed fee mechanism of paying physicians employed until then had not been substantially readjusted between 1958 and 1967 (Hayes 737–38).

113. Until 1968, the only subscribers receiving full service benefits (*i.e.,* medicial services with no individual [**27**] out-of-pocket expenses) were those with an income falling short of a fixed amount ($7,500 at that time). When a "formally participating"[8] physician treated a patient whose income exceeded the limit, he/she could charge the patient in excess of the fixed fee (Hayes 738; Glasser 589, 591).

114. The UAW objected to the imposition of such an income limit, because its members whose income exceeded this amount were obligated to pay additional charges (Glasser 592). It wanted full service benefits (Hayes 738, 742).

115. After 1970, MSMS maintained a liaison with BCBSM to provide professional input on policies (Hayes 318). Dr. Hayes of BCBSM communicated with professional providers of services, including MSMS (Hayes 309, 313, 314).

116. BCBSM employs the term "service benefits" to identify the

[8] *See* definition, finding 119 *infra.*

nature of the product that it provides to its subscribers (Hayes 329). "Service benefits" denotes a plan under which BCBSM pays providers of health care directly for medical services rendered to subscribers, and pays for covered services in full so that the subscribers incur no out-of-pocket expenses (Hayes 329–30; Glasser 489). The providing of service benefits by BCBSM therefore entails direct payments to physicians, including MSMS members. BCBSM does not provide any contracts other than for service benefits (Hayes 329–30).

117. Service benefits coverage is distinguished from indemnity insurance. An indemnity insurance contract provides for payment to subscribers of a fixed amount for a specific medical occurrence. In contrast, the service benefit contract provides for payment for service in full, without regard to a fixed amount (Hayes 330–31; Glasser 498–99). BCBSM does not offer indemnity insurance to its subscribers (Hayes 331).

118. BCBSM and its corporate predecessors have offered service benefit policies since 1940 (Hayes 341–42), and BCBSM considers service benefits to be a "founding and lasting principle" of its health care policies (CX 249–R). The services benefits concept also provides a competitive difference for BCBSM as opposed to other commercial insurance carriers. Some BCBSM subscribers, such as UAW, strongly prefer service benefits to other forms of coverage, because they believe that this assures that individual subscribers will not be overcharged by providers of health care (Glasser 491–92).

119. Service benefits coverage is closely tied to the concept of "physician participation" (Hayes 360). A "formally [28] participating physician" signs an agreement with BCBSM in which he or she promises to provide services to BCBSM subscribers, to accept BCBSM payment for such services as payment in full, and not to bill subscribers additionally for these services (Hayes 352). The greater the number of physicians who agree to formally participate, the more readily BCBSM can assure its subscribers that they will receive service benefits (Hayes 360). Both BCBSM and its subscribers believe it to be of critical importance that an adequate number of physicians agree to formally participate (Hayes 360; Glasser 496, 502–03, 570).

120. When a BCBSM subscriber is treated by a physician who has not signed a participation agreement with BCBSM, the physician's office staff will, in the vast majority of cases, fill out a BCBSM form for that subscriber and transmit it directly to BCBSM. The nonparticipating physician may elect to indicate on the claim form that he or she would like to be paid directly by BCBSM for that case, or he or she may check a box indicating that BCBSM is to reimburse the subscriber directly (Hayes 357–58). The nonparticipating physician may participate with BCBSM for that particular case, and accept

BCBSM's reimbursement as payment in full for that case (Hayes 358, 369). This is called "per-case participation," and the claim is processed identically to those of formally participating physicians.[9]

121. Formal participation enables BCBSM to develop records concerning the trends of costs and the filing of claims and to implement cost-containment policies based on these records (CX 249–R; Glasser 492–98).

122. By statute, BCBSM is required to have a majority of Michigan physicians enrolled as participating physicians in order to offer service benefits to subscribers (Hayes 360). As a practical matter, BCBSM cannot assure delivery of service benefits if formal participation by physicians falls significantly below the sixty-percent level (Hayes 360; Glasser 502).

123. When a BCBSM subscriber is treated by a participating physician, that physician's office staff prepares a claim form which it transmits to BCBSM. BCBSM processes the form and makes direct payment to the physician, and that payment constitutes full payment for services rendered (Hayes 352, 354–56, 371). **[29]**

124. If a physician elects not to participate, either formally or on a per-case basis, BCBSM reimbursement is made directly to the subscriber (Hayes 357–59, 368). In this circumstance, the subscriber may be obligated to make an out-of-pocket payment to his or her physician above the amount of BCBSM's reimbursement, because the nonparticipating physician is not obligated to accept BCBSM reimbursement as payment in full (Hayes 358–59).

125. When a nonparticipating physician treats a subscriber and decides not to participate on a per-case basis for that claim, the subscriber must sign a consent clause on the claim form indicating the subscriber's awareness that the physician's charge may exceed the BCBSM reimbursement, and that the excess charge is to be paid by the subscriber. In the event the subscriber has not executed this consent clause, when BCBSM mails its reimbursement to the subscriber, a statement is included to the effect that BCBSM has paid an appropriate fee based on its formula, and that if the subscriber receives a charge in excess of this amount, it will be paid by BCBSM (Hayes 359).

126. The nonparticipating physician is at liberty to determine the patient's ability to pay a fee higher than the amount of a BCBSM reimbursement for a given case, and based on this judgment, can decide whether or not to participate on a per-case basis (Hayes 358–59). Therefore, for the nonparticipating physician, BCBSM reimbursement constitutes the minimum, but not the maximum, amount

[9] Per-case participation is provided for in a 1963 Consent Decree between BCBSM and the Michigan Insurance Commissioner (Hayes 768).

expected as payment to be paid for services rendered to a BCBSM subscriber; because the nonparticipating physician has the option of accepting BCBSM reimbursement as payment in full, or demanding a higher reimbursement from the subscriber.

127. Neither BCBSM nor the UAW believes that per-case participation by physicians is an acceptable substitute for formal participation, because optional per-case participation does not assure subscriber receipt of service benefits. Frequently, BCBSM subscribers are unaware of a physician's participation status, or they neglect to ask about this (Hayes 360–61; Glasser 508–10). Thus, subscribers who visit nonparticipating physicians risk an unanticipated out-of-pocket expense (Glasser 508–10).

128. Therefore, BCBSM seeks to encourage as many physicians as possible to formally participate (CX 249–R). BCBSM places no limit on the number of physicians who may formally participate (Hayes 353).

129. BCBSM determines reimbursement for every claim submitted by comparing the physician's charge entered on the claim form against two standards—the treating physician's "profile", and the prevailing "screen"—and pays the lower [30] amount indicated (Hayes 362, 367). "Profiles" measure individual physician's past charges for a particular medical service or procedure. "Screens" determine maximum BCBSM reimbursement to physicians in a given geographic area for that service or procedure.

130. A physician's "profile" is the charge that the physician most frequently makes for a specified service. BCBSM determines a physician's profile from the claim forms submitted by him over the previous 12-month period (Hayes 363). BCBSM keeps profiles on all physicians who submit claims, whether or not they participate (Hayes 367).

131. A "screen" is the amount which BCBSM determines to be the reasonable maximum reimbursement for a specified service rendered by any physician in a given geographic area, and is based on physicians' actual charging patterns in that area. Currently, BCBSM calculates "screens" on a statewide basis. Previously, BCBSM had divided the state into several geographic regions for purposes of determining screens. Under the past system, maximum reimbursement in some parts of the state, such as metropolitan Detroit, was higher than in other parts of the state (Hayes 364–66).

132. In some instances, BCBSM calculates screens in terms of percentages of charges paid in full. For example, a screen at the "80th percentile" means that maximum BCBSM reimbursement is an amount predetermined to pay in full 80 percent of claims for a given procedure (Hayes 364).

133. Some of the service benefits packages which BCBSM provides to subscribers are developed by the subscribers themselves. For example, since 1963, the UAW has independently developed health care coverage which it seeks to have employers supply UAW members (Glasser 483). These are developed with the in-house expertise of the UAW Social Security Department, and through consultation between the UAW and health care providers. (Glasser 476, 482–83). The benefits are then collectively bargained-for between the UAW and employers (Glasser 478–81). The plan, reflecting the outcome of negotiation, is then purchased from BCBSM (or another health insurer) (Glasser 483).

B. Michigan Medicaid

134. Under the Medicaid program, established pursuant to 42 U.S.C. 1396 *et seq.* (1976 & Supp. III 1979), health care providers, including physicians, throughout the United States are reimbursed from a combination of federal, state, and sometimes local funds for medical services rendered to millions of eligible low-income persons (CX 728–A).

135. Michigan's Medicaid program is administered by the Michigan Department of Social Services, which makes direct payments to physicians, including MSMS members, and other [31] providers of health care, for covered services rendered to eligible persons (Mich. Comp. Laws Ann. Sections 400.1, 400.105–.112 (West 1976 & Supp. 1980–81), *as amended by* Act of Dec. 12, 1980, Pub. Act. No. 321, Mich. Adv. Sess. Laws Rep. (CCH 657; *see generally* CX 421, CX 7–S)).

136. Both the Federal Government and the State of Michigan define the relationship between individual physicians and the Medicaid program (Mich. Comp. Laws Ann. Sections 400.105–.112 (West 1976 & Supp. 1980–81), *as amended by* Act of Dec. 12, 1980, Pub. Act No. 321, Mich. Adv. Sess. Laws Rep. (CCH) 657; 42 U.S.C. 1396 *et seq.* (1976 & Supp. III 1979); 42 C.F.R. 430–456 (1979) (and amendments)). A physician who agrees to treat a Medicaid recipient agrees to accept Medicaid's payment for covered services rendered (42 C.F.R. 447.15 (1979), *as amended by* 45 FR 24,889 (1980)). The amount of Medicaid reimbursement is determined by reimbursement policies which are similar to those used by BCBSM (*see* 42 C.F.R. 447.341 (1979), *as amended by* 45 FR 24,889 (1980); Findings 129–130 *supra*).

V. ACTIVITIES OF MSMS LEADING TO THE COMMISSION'S COMPLAINT

A. Relationship Between MSMS and BCBSM

137. As noted, finding 110, *supra,* before 1970 the House of Delegates of MSMS selected the Board of Directors of BCBSM (Hayes 315–317). In addition, until 1970, representatives of BCBSM attended all House of Delegates meetings to keep MSMS abreast of BCBSM activities (Hayes 315–317).

138. In 1970, MSMS severed its formal relationship with BCBSM (Hayes 317) although an informal liaison was retained through Dr. Louis Hayes of BCBSM. Dr. Hayes communicated with MSMS through its staff about administrative matters, or when the issue was policy matters, through the MSMS' President or Council Chairman. MSMS contacted BCBSM when there were matters of concern to discuss (Hayes 314, 318). From 1968 to 1980, Dr. Hayes was also an alternate delegate from Wayne County to the MSMS House of Delegates (Hayes 324).

B. MSMS Areas of Concern

139. In 1974, respondent MSMS formed a negotiating committee, which was to operate as a liaison between respondent and BCBSM (Crandall 1678). The chairman of this committee was Dr. Donald Crandall (Crandall 1679).

140. At this time several issues were of primary importance to MSMS and its members. One such issue was the determination of MSMS to have a uniform claim form and coding system, which MSMS members believed would be more efficient and [32] would serve to facilitate cost containment (Crandall 1680; Hayes 746). Because physicians treat patients insured by a number of insurance carriers, a uniform claim form would eliminate the need to deal with many different types of forms.

141. BCBSM agreed, in principle, that the use of uniform claim forms and coding systems was justified as a method of insuring the accuracy of information provided by the individual filling out the forms (Hayes 747). However, BCBSM believed that the changes proposed by MSMS would be too expensive because of the required adjustment to BCBSM's data processing system (Hayes 388), estimated to be more than $1 million. In addition, BCBSM felt that the system proposed by MSMS was too complex and detailed (Hayes 389). A report written by BCBSM in October 1979 detailed its objections (CX 446 E–I).

142. Another subject of controversy between BCBSM and MSMS

was that of a statewide screen for Michigan physicians. Prior to 1978 physicians were reimbursed based on a regional screen (*See* Finding 131, *supra*).

143. During meetings of the MSMS Negotiating Committee in 1974 and 1975 this issue was raised. The Committee suggested to BCBSM that a statewide screen would more accurately reflect the cost of doing (medical) business in the State of Michigan and that this was especially true because of the specialists practicing statewide (Hayes 752; Crandall 691; CX 458D).

144. BCBSM rejected physician demands for a statewide screen for reasons of cost and equity. BCBSM reasoned that if a statewide screen was created by raising all regional screens to the level of the highest screen (covering the Detroit metropolitan area) the result would mean an increase of approximately $7 million in the payments made by BCBSM to physicians. Such an increase BCBSM believed would be unacceptable to its subscribers and to the Michigan Insurance Bureau (CX 107H–I).

145. Another option available to BCBSM was to create a single screen by averaging all the existing regional screens. This would have had the advantage of not increasing reimbursement, but would also have reduced payments to physicians in the Detroit area, 69% of the total BCBSM payout. However, BCBSM believed that this would have been unacceptable to Detroit doctors (CX 462–Z–33, Z–34, CX 445C).

146. The third area of contention between BCBSM and MSMS concerned the updating of physician's profiles (Crandall 1694). In discussions between BCBSM and MSMS, respondent asked BCBSM to send out profiles annually for physicians to review (Hayes 754, 755). As of 1974, only 33 percent of Michigan physicians requested updates on their profiles on an annual basis (Hayes 755; CX 107). **[33]**

147. BCBSM was unwilling to automatically update physicians' profiles, because to do so would have increased reimbursements, *e.g.*, 1974 by $13 million (CX 107–I).

C. MSMS Negotiations with BCBSM

148. In April 1975, the MSMS Negotiating Committee issued a report to the MSMS House of Delegates, which was excerpted in *Michigan Medicine* (CX 462A–Z–33, Z–36). This report summarized the prior year's activities and negotiations with BCBSM regarding uniform claim forms and coding, statewide screens and automatic profile updates from BCBSM (CX 47A–F; CX 8L–0) and stated:

The recalcitrant attitude of Blue Shield on the subjects of regionalization of fees and physician profiles, coupled with what appears to be a total lack of willingness to

cooperate with MSMS in the development of a uniform claim form or even consider the use of CPT procedural code, can only bring the Committee to one logical conclusion: Blue Shield apparently has no intention of ever compromising on, or cooperating with, MSMS on any of the issues we have discussed with them during the past year (CX 47–F; CX 8–0).

149. The Negotiating Committee therefore specifically recommended that the MSMS House of Delegates urge MSMS members to join in a concerted campaign against BCBSM to compel BCBSM to modify its position:

(A) All MSMS members who have a formal participation agreement with Blue Cross-Blue Shield to notify same, by letter, that they no longer will participate, these letters to be mailed to MSMS, in care of the Negotiating Committee with Third-Party Carriers, which will have the option of exercising the nonparticipation "proxies" upon 10-day advance notice to the physician; (B) All members to not submit any Doctor's Service Report "Payment to Doctor" claim forms for services rendered to Blue Cross-Blue Shield; (C) All MSMS members to continue submitting Doctor's Service Report "Payment to Subscriber" claim forms, duly signed by the subscriber (or patient) and the physician; and (D) All MSMS members to not take any "per case payment," as this could be construed as "participation" by Blue Cross-Blue Shield (CX 47–F; CX 8–0) (emphasis in original).

150. During its May, 1975 annual meeting, the House of Delegates authorized the Negotiating Committee to collect nonparticipation proxies from all physicians. These would be held by MSMS and would be "executed only with prior notice and at the discretion of the council, upon recommendation of the [34] Negotiating Committee if a negotiating impasse develops with Michigan Blue Cross/Blue Shield" (CX 8–0).

151. The House of Delegates' decision to authorize the Negotiating Committee to collect "non-participation proxies", was reported to the MSMS membership in a May 1975 *Medigram* (CX 38–A), and was subsequently communicated to the membership in greater detail in the August 1975 issue of *Michigan Medicine,* (CX 8). In May 1975, Dr. Crandall sent letters on behalf of MSMS to several MSMS component societies requesting the opportunity to personally explain the significance of the House of Delegates decision to collect proxies, and also to explain "why it is imperative MSMS has the cooperation and support of the doctors" (CX 330; CX 337; CX 352). Additionally, a member of the Negotiating Committee spoke at a component society meeting advising the membership of the decision to collect proxies and requesting support (CX 310–D; CX 445–A). However, MSMS did not collect proxies in 1975, apparently because negotiations with BCBSM proceeded more smoothly on some of the issues in question.

152. Subsequent to the 1975 House of Delegates meeting, negotiations resumed between the Negotiating Committee and representa-

tives of BCBSM (Hayes 402). These meetings were attended on behalf of BCBSM by the BCBSM Board of Directors' Professional Relations Committee, along with BCBSM management. Previously, only management representatives had attended on behalf of BCBSM (Hayes 402). Dr. Crandall reported this as a concession by BCBSM in recognition of the "overwhelming" support the MSMS House of Delegates expressed for the Negotiating Committee by authorizing collection of proxies, and that this demonstrated the "clout" MSMS could exert against third-party payers:

> The Professional Relations Committee of the Blue Shield Board then intervened in the face of this overwhelming support by MSMS delegates for the Negotiating Committee's stands. The BC/BSM Board recognized the significance of the disagreement and guaranteed that progress would be made if the Negotiating Committee reinstated deliberations. The Negotiating Committee had thus established its credibility and its clout through the support of all the MSMS delegates (CX 411–D).

153. At an October 8, 1974, meeting of the MSMS Negotiating Committee, BCBSM stated that it would accept a uniform claim form developed by the AMA (CX 445–B; CX 446E–I). The Negotiating Committee was agreeable, as they were merely interested in the development of some type of uniform claim form (Crandall, 1687–88). Eventually, the AMA form was rejected by BCBSM. However, BCBSM agreed to continue working on the development of a uniform claim form (CX 446–I). **[35]**

154. A uniform claim form was drafted by BCBSM and Medicaid representatives (Hayes 748). But by January 1975, it seemed to MSMS that BCBSM was no longer committed to the project (Crandall 1684). An impasse between the parties developed (Crandall 1686).

155. In May 1975, there was a joint meeting of the members of the MSMS Negotiating Committee and BCBSM's Professional Relations Committee. At this time it was decided that work would continue on the uniform claim form and coding system, and that BCBSM would continue to work with Michigan Medicaid to draft a sample form (Hayes, 750; Crandall, 1686–1687).

156. Between the 1975 and 1976 House of Delegates meetings, MSMS and BCBSM (and other third-party payers) came into an agreement on a single coding system and uniform claim form (CX 9–M–N; CX 411–D). However, MSMS' demands concerning a statewide screen and profile updates remained unresolved (Hayes 403; CX 411–D).

157. The issue of a statewide screen was the subject of numerous discussions within the Negotiating Committee. (Crandall 1690; Hayes 383–84; 401–02).

158. For some time there were four regions for the purpose of setting screens. Region No. 1 had always been the greater metropoli-

tan Detroit area, consisting of Wayne, Oakland and Macomb Counties. Region 2 included all counties in Michigan in which there was a city with a population in excess of 50,000. Region No. 3 consisted of all of the other counties in the lower peninsula; and Region No. 4 contained all of the counties in the upper peninsula. After several years, BCBSM consolidated these into three regions, because the physicians' screen in the upper peninsula gradually came more into line with those in the lower. Accordingly, Regions three and four were combined (Hayes 365).

159. During this period, BCBSM reimbursement to physicians often varied from region to region (Hayes 365–66). MSMS objected to this, contending that the cost of practicing medicine was uniform statewide (CX 458–D) and that regionalization of fees "antagonized and created further dichotomy between physicians in the State of Michigan" (CX 458–E). In addition, MSMS contended that regionalization of screens was a cause of maldistribution of physicians in the State of Michigan (CX 458–E).

160. It was MSMS' position, that while it favored BCBSM implementing a statewide screen, it was not urging that BCBSM increase its overall dollar payout to physicians in the process (Hayes 752; CX 462–Z–33; Crandall 1692). **[36]**

161. During one of the discussions between them, the MSMS Negotiating Committee suggested to BCBSM that it utilize its own cost containment guidelines, and lower the percentage increase in the various regions of the state until a statewide screen was achieved. This could be done, it was suggested, on a gradual basis over a reasonable time period of BCBSM's choosing (Hayes 752–53).

162. The Negotiating Committee also took the position with BCBSM that regionalization of screens was unfair to subscribers in outlying areas, because these patients had to pay the same premiums, but were receiving less in the way of benefits (Crandall 1692–93).

163. On October 8, 1974, BCBSM promised MSMS a report responding to certain suggestions regarding the updating of physician profiles. However, no such report was ever received by MSMS (CX 47–E; CX 445 A–D).

164. In January 1975, BCBSM told to the MSMS Negotiating Committee that it would work out some mechanism which would accomplish a statewide screen. But in February 1975, BCBSM stated to the Negotiating Committee that it would not do so, because a statewide screen was against BCBSM policy (Crandall 1693).

165. In February 1975, BCBSM told the MSMS Negotiating Committee that it would reconsider its rejection of a statewide screen, if MSMS would guarantee that there be no decrease in formal participa-

tion in Region No. 1 if such a screen was implemented (Crandall 1693–94).

166. The Negotiating Committee responded to BCBSM that it could not guarantee any level of participation in Region No. 1, because participation was entirely a matter of individual decision on the part of each physician (Crandall 1694).

167. In 1976, the AMA created a Department of Negotiations, which offered a series of instructional seminars on negotiations (CX 10Z–3). Members of the MSMS Negotiating Committee attended these seminars (CX 411–D–E; CX 10–Z–3). They determined that a state level Division of Negotiations, corresponding to and communicating with the AMA organization could function as an effective mechanism (CX 411–D–E; CX 1, 0–Z–3).

168. In May 1976, when the MSMS House of Delegates held its annual meeting, the delegates agreed to create an MSMS Division of Negotiations. The functions of the new Division were to include, but not be limited to:

1. Identification of specific problems amenable to negotiations;
2. Assembly of pertinent data and research of problems; [37]
3. Establishing of guidelines;
4. Negotiation of solutions;
5. Devising of specific action plans;
6. Coordination of all negotiation activities of MSMS;
7. Giving assistance to physicians, medical groups and communities as requested for negotiating problems;
8. Educating the membership regarding the use and techniques of negotiation;
9. At the earliest time possible, obtain authorization from all members of MSMS for the department of negotiations of MSMS to be the exclusive bargaining agent for all;
10. Collect immediately "non-participation proxies" from all physicians to be held in escrow at MSMS, to be executed in the event of failure of negotiations; and
11. The department of negotiations formulate a "negotiated participation agreement" with third-party payors which shall eliminate reasons for nonparticipation. (CX 13–Q; CX 9–Z–31).

169. Dr. Crandall explained to the House of Delegates that the Division of Negotiations would negotiate (with third-party payers) the manner of determining fees, but not specific fees (CX 13–Z–13).

170. During debate over the resolution to form the Division of Negotiations, concern was expressed by some delegates about the propriety of requesting nonparticipation proxies from MSMS members. An amendment was offered to strike this provision from the

resolution (CX 13–Z, Z–1, Z–2). Speaking against the amendment, one delegate pointed out that the proxies would give MSMS a weapon to use against BCBSM:

> It has been my observation during the past year that one of the very effective tools that people have in negotiating in behalf of physicians in this state is the participation agreements the physicians maintain with Blue Cross and Blue Shield. [38]
>
> It is my feeling that the negotiation department ought to know one of two things: Either it ought to know that it is not able to get the participation proxies, in which case it could structure its negotiations accordingly; and more hopefully and, I believe, more likely, it would have in hand a proxy from a larger majority of physicians in Michigan, which it could use as it came to the autos.
>
> When I go hunting, I like to have a full gun, and so should the department of negotiations (CX 13–Z–6, Z–7).

171. The proposed amendment was defeated and collection of proxies was authorized (CX 13–Z–9).

172. The proxies collected by MSMS would not be exercised without the approval of the Council of Delegates, and upon ten-days' notice to each physician who signed one (CX 178–H).

173. The August, 1976 issue of *Michigan Medicine* stressed the need for unified membership support for the Division of Negotiations, and stressed the necessity of members submitting nonparticipation proxies (CX 75).

174. The Division of Negotiations reported to the Council of Delegates at the latter's meeting in July 1976, and proposed that the Division recommend to the Council the circumstance in which the proxies should be used (CX 177B–C, R–U). A follow-up report was submitted to the Council on August 23, 1976 (CX 472), advising the Council that a mailing to MSMS members soliciting nonparticipation proxies would be sent on August 25, 1976 (CX 472 B–F).

175. A resolution was proposed and adopted, resolving that the results of the proxy solicitation be given only to the Chairman of the Division on Negotiations, the President of MSMS and the Chairman of the Council (Crandall, 1703; CX 472–B; CX 178–H).

176. Shortly after its establishment, the Division of Negotiations discovered that BCBSM was developing a new method of reimbursement for services performed by hospital-based radiologists and pathologists (CX 10–Z–3; CX 463). MSMS objected to this, contending that this amounted to interference with the contractual relationship between these specialists and their hospital employers (Crandall 1700; Hayes 775–76).

177. The Michigan Radiological Society had expressed its concern about the manner in which they would be reimbursed by BCBSM

(Hayes 777), and had then contacted MSMS, requesting advice and assistance (CX 464). [39]

178. In June 1976, Dr. Crandall proposed that a meeting be held between the Negotiating Committee and representatives of the affected specialists (CX 468). He suggested to the presidents of the pathology and radiology societies that MSMS could assist them and that there should be a solicitation of pathologists and radiologists' departicipation proxies to be held in escrow at MSMS (CX 177–S).

179. This meeting was held at MSMS headquarters on July 21, 1976. It was decided that nonparticipation proxies would be collected from all MSMS members ". . . to be executed only with the approval of the Council and within ten days notice to each physician signing a non-par[ticipation] proxy, in the event of failure of negotiations with Blue Cross/Blue Shield" (CX 650–C).

180. Simultaneously, the Michigan Radiological Society established its own Ad Hoc Committee to deal with and respond to BCBSM's proposed reimbursement system for hospital based physicians (RX 3–A), and published its own position paper (RX 3–A–F).

181. On August 18, 1976, BCBSM requested that the Michigan Society of Pathologists submit cost containment ideas regarding laboratory and x-ray testing services (RX 40A). In addition, BCBSM that month issued its "Initial Report on Hospital-based Physician Compensation: Pathology and Radiology." The report recommended that discussions be held with representatives of these groups, including MSMS, to keep them informed and to provide for an input mechanism (CX 69–D).

182. On September 29, 1976, the Board of Directors of BCBSM approved a cost containment plan relating to reimbursement for hospital-based physicians (RX 38–A).

183. In summary, as of August 25, 1976, the Division of Negotiations had received Council approval to solicit nonparticipation proxies from MSMS members and obtained approval to keep the results secret. Additional impetus for proxy solicitation resulted from the agreement between MSMS and the specialty societies to collect and use proxies (Finding *179*).

184. Nonparticipation proxies were solicited from MSMS members by letter dated August 25, 1976 signed by then Council Chairman Dr. Ernest P. Griffin (CX 2). This letter reviews the prior negotiations between MSMS and BCBSM and refers to the 1975 decision of the MSMS House of Delegates to solicit nonparticipation proxies:

The House approved that report to give its Negotiating Committee with Third Party Carriers the power to negotiate effectively with Blue Cross/Blue Shield. A certain

percentage of the physicians in Michigan must be participating or Blue Cross/Blue Shield may lose special advantages it holds under its enabling legislation. [40]

In 1975, the major issues MSMS and BC/BS were negotiating were the uniform claims form and uniform coding system. As you know, after the approval of the report, both the claims form and the coding became a reality.

(CX 2–A).

185. The members were advised that "Blue Cross/Blue Shield continues, however, to propose and execute unilateral programs that are not in the best interest of MSMS members." These programs include "so-called cost containment programs that in effect reduce reimbursements to physicians or place the responsibility for the reduction of costs solely on the practicing physician" (CX 2–A).

186. The letter explained that collection of proxies was now necessary to combat those unilateral cost-containment programs:

[W]e now ask for your proxy, so that the MSMS Committee can function as an equal with BC/BS. Our MSMS position must be backed with the power to non-participate, if it becomes necessary to use the proxies. Our tactical strength can be applied more quickly if the proxies are already in the hands of the Negotiating Committee, rather than waiting for receipt of them from the physicians throughout the State (CX 2–A).

187. Two "powers of attorney" were sent with the letter, one captioned "Power of Attorney to Michigan State Medical Society Re: Blue Cross/Blue Shield," the other captioned "Power of Attorney to Michigan State Medical Society Re: Michigan Medicaid" (CX 2–C). The powers of attorney are substantially identical, each providing that:

I [name typed] , hereby designate Michigan State Medical Society, a Michigan corporation, as my agent and attorney-in-fact for the purpose of canceling my participation agreement with Blue Cross-Blue Shield [or, with respect to Medicaid, my participation in the Michigan Medicaid program].

This power of attorney shall remain in full force and effect until June 30, 1978, unless revoked by me in writing prior thereto (CX 2–C).

These powers of attorney gave the Negotiating Committee the right to departicipate Michigan physicians from BCBSM and Medicaid if an impasse was reached in negotiations, and the Division of Negotiations and the MSMS Council determined that departicipation was warranted (CX 10–Z–3; CX 411–E–G). [41]

188. MSMS officials made efforts in the weeks which followed the sending of this soliciation, to assure component society and membership support. In October 1976, Dr. Griffin addressed the Board of Directors of the Oakland County Medical Society (an MSMS component society) concerning both the proxy solicitation effort, and the

efforts of specialists' organizations and MSMS to oppose BCBSM's hospital-based physician reimbursement proposals. Dr. Griffin stressed the importance of the Negotiating Committee, and in particular, the need for component society support for that committee's efforts (CX 311–B).

189. In October 1976, the MSMS Negotiating Committee reported to the Council that "we have received an overwhelming response from physicians who have indicated they are very willing to lend support to the MSMS proxy solicitation campaign" (CX 473–A). The Negotiating Committee reported that MSMS had received support from the Genesee County Medical Society, the Michigan Societies of Radiology and Pathology, and other specialty societies and professional corporations (CX 472–A; CX 10–P–Q). It stated further that the dispute between hospital-based specialists and BCBSM over reimbursement methods had been concluded favorably to the specialists. "The Committee on Negotiations feels it was instrumental in combining the forces of the Michigan radiologists and pathologists in confronting the initial Blue Cross/Blue Shield proposals" (CX 473–A). Council Chairman Griffin issued a report which reiterated the Negotiating Committee's assertions, noting further that, as a consequence of MSMS actions, present methods for reimbursing hospital-based physicians remained in effect (CX 653–A–B).

190. Ultimately, a majority of Michigan physicians executed proxies and submitted them to the Negotiating Committee (CX 10–Z–3; CX 411–F). The Committee identified them as "the most significant factor in establishing the authority of the Division of Negotiations" (CX 10–Z–3).

191. Dr. Hayes of BCBSM, an MSMS member, received a copy of the proxy solicitation (Hayes 409). Dr. Hayes transmitted copies of the solicitation to BCBSM's president, John McCabe, as well as to other BCBSM executives who had in the past dealt with MSMS under Dr. Hayes' direction (Hayes 412). Although BCBSM was not apprised of the results of the proxy solicitation, it was seriously concerned about its implications and expressed that concern in a letter prepared by Dr. Hayes for Mr. McCabe's signature. This letter was sent to MSMS, its Council, and its component societies on September 15, 1976 (Hayes 412–14; CX 393). In part, the letter stated:

> If the ultimate intent of garnering proxies is attained—wholesale de-participation by physicians—there will be ominous implications for all concerned. [42]
>
> Obviously, the ability of BCBSM to deliver service benefits would be diminished. In the process, MSMS could lose its strongest ally in the struggle to retain our current method of financing and delivering health care—keeping it in the private sector.
>
> Our subscribers—your patients—would be impacted. They may be subjected to greater

out-of-pocket expense. In the process, their attitudes about physicians are sure to deteriorate (CX 393–B–C).

It closes with an offer to conciliate:

We are most anxious to continue relating to the medical profession—whether in an atmosphere of "liaison," or one of "negotiation"—is not important. We are necessary to each other and must meet, discuss and reach agreements. BCBSM stands ready to meet and discuss—and has asked for an early exploratory meeting. We hope for an early response (CX 393–C).

192. Discussions between BCBSM and MSMS continued in November 1976, but no resolution of outstanding reimbursement issues was reached (CX 10–Z–4; CX 411–H).

193. In the fall of 1976, the MSMS Division of Negotiations was involved in discussions with BCBSM on cost containment and it set up a "brainstorming session" in November 1976 to identify potential problem areas, and to develop dialogue to solve such problems and to avoid confrontation. The "brainstorming session" was attended by leaders of the MSMS and Division of Negotiations, by and representatives of BCBSM (Crandall 1707; CX 373–B).

194. In 1977, BCBSM made several major changes in its reimbursement policies. The first change was to increase reimbursement to physicians who formally participated with the goal of encouraging all Michigan physicians to do so (Hayes 416). This was done with no prior notice to MSMS (Crandall 1708; RX 8).

195. BCBSM decided to implement a statewide screen for participating physicians, and to automatically update the physicians' profiles for all physicians who agreed to participate for a one-year period beginning in October 1977. These profiles would be updated to the charge levels shown on claim forms filed by the participating physicians from July 1976 to June 1977. This would allow participating physicians a cumulative carry-over of annual customary fee increases in the event they elected not to file an annual request with BCBSM for a fee increase. The cumulative carry-over was intended to give these physicians who did not apply for an annual profile increase an increase based on the total rate of increased charges from the date of their last profile increase, rather [43] than for only a twelve-month period, as had previously been BCBSM's policy (Hayes 419–20; CX 356–O).

196. In BCBSM's view, the new reimbursement policy was directed at encouraging cost containment, and improving payout levels and equity in payment to physicians (RX 8; CX 636–C; CX 638–B; RX–10; RX–60). Principally, BCBSM implemented this policy to encourage formal participation (Hayes 419; 702). BCBSM promoted formal par-

ticipation because this would assure the subscriber a service benefit (Hayes 787). Formal participation had fallen below the level BCBSM felt was necessary to assure full service benefits to its subscribers (Hayes 360, 709).

197. In many respects, these new reimbursement policies gave physicians reimbursement increases which had been previously demanded by MSMS. However, BCBSM offered the statewide screens and profile updates only on those physicians who agreed to formally participate. They were not offered to nonparticipating physicians, including those who participated only on a per-case basis (Hayes 421). BCBSM's new reimbursement policies increased reimbursement payments to participating physicians, but not to nonparticipating physicians (Hayes 422–23).

198. However, these new policies were not designed to interfere with other BCBSM reimbursement policies, which in the ordinary course of events increased reimbursement to all physicians, whether participating or nonparticipating. BCBSM would have continued to adjust the profiles of those nonparticipating physicians who requested adjustments, and would have continued to increase area screens for nonparticipating physicians based on actual charging patterns (Hayes 423).

199. "Service benefit performance" is defined by BCBSM as the percent of claims in which no out-of-pocket payments need be made by subscribers. Effective service benefits refer to the percentage of all claims for which physicians accepted BCBSM payments as payment in full (Hayes 729–32). Effective service benefits are those where 90 percent of the services to the subscribers are paid without additional payment by the subscriber (Hayes 723), even though less than 90 percent of doctors in the state of Michigan formally participate.

200. It was BCBSM's position, as of the spring of 1977, that its effective service benefit level was too low. This was the result of a gradual decline over a period of almost one year (Hayes 731). As of April 1977, BCBSM's effective service benefit performance was 97.6 percent. At that same time, 94.5 percent of the claims were submitted with instructions to pay the physician, which meant the physician was either a per-case physician or a formally participating physician (Hayes 733, RX 48 A–X). As of April 1977, BCBSM paid only 80.3 percent of all dollars charged by physicians. [44] Therefore, although BCBSM had a 97.6% effective service benefit, it paid only 80.3% of physicians' charges (Hayes 791).

201. When a subscriber is treated by a nonparticipating physician who elects to not participate on a per-case basis, the charge may be equal to that which BCBSM would have reimbursed under its applicable formula (Hayes 729).

202. As noted, finding 122, *supra,* Dr. Hayes testified that service benefits are not assured unless there is at least a 60 percent formal participation rate by Michigan physicians (Hayes 360). However, in 1977, only 58 percent formally participated (Hayes 710).

203. At the same time BCBSM announced its new physician reimbursement policies. It also announced a new cost containment policy called Target Limitation on Expenditures ("TLE"). Under TLE, a ceiling was placed on the aggregate amount that BCBSM would reimburse physicians statewide for each type of service. If payments to physicians exceeded the ceiling, BCBSM would subsequently lower reimbursement to physicians for that service. If payments were less than the targeted amount, BCBSM would increase payments to physicians for that service (RX 10–C–D; Hayes 424–26; CX 356–P).

204. BCBSM was concerned, at this point, with the increase in the utilization by subscribers of physicians' services, rather than by an increase in charges by physicians (Hayes 424, 704, 711–712).

205. TLE was approved by the BCBSM Board of Directors before all details were worked out (Hayes 712).

206. Also at this time, two other benefit programs were announced: the Vision Care Plan and the Hearing Care Plan (Hayes 428–29). In October 1976 the UAW and Ford Motor Company negotiated employee vision and hearing care benefits (Glasser 510–17) which were to become effective in October 1977 (Glasser 511). Chrysler Corporation and General Motors also agreed to these benefits. Ford and Chrysler purchased vision care benefits from BCBSM, while General Motors purchased vision care benefits from a commercial insurer. All three companies purchased hearing benefits from BCBSM (CX 92–D; CX 182Q; Glasser 518–19).

207. The details of the vision and hearing care packages were part of the collective bargaining agreement between the automobile companies and the UAW, with no input from BCBSM (Hayes 429; Glaser 477–83, 511–19, 559, 564, 569–70).

208. Unlike normal service benefit plans, the Vision Care Plan paid its nonparticipating physicians only 75 percent of the amount paid to participating physicians (Glasser 514–15, 596; Hayes 763). Per-case participation was not allowed [45] (Glasser 511–17). The UAW member paid the first twenty percent of the fee. Treatment by either optometrists or opthamologists would be reimbursed (Hayes 765).

209. The Hearing Care Plan provided for usual, customary and reasonable reimbursement to participating physicians, audiologists and hearing instrument providers, and *no* reimbursement to nonparticipating providers (Glasser 518, 597; Hayes 763). Again, no individual case participation was permitted (Glasser 519).

210. Ford proposed, and the UAW agreed, that nonparticipating

providers not be reimbursed for hearing care, because such services are not emergency services, and therefore delays which might result from a shortage of participating providers would not present a problem (Glasser 519). The UAW and Ford agreed that reimbursement differentials between participating and nonparticipating physicians was a good idea, because such differentials increased participation, and resulted in better cost and quality controls (Glasser 517, 519).

211. MSMS opposed BCBSM's new reimbursement policies and the vision and hearing care benefits. Its position was that these programs interfered with the physician-patient relationship and discriminated against patients of nonparticipating providers (Hayes 764). The MSMS Committee on Negotiations offered to meet with BCBSM to develop a reimbursement system more acceptable to MSMS than TLE (CX 637; Hayes 428; CX 89–A).

212. In late June 1977, BCBSM representatives met with representatives of MSMS to explain the then-proposed new reimbursement and cost-containment policies, indicating that BCBSM's Board of Directors would consider the proposals in July (Hayes 426). In August 1977, after the reimbursement changes had been approved by BCBSM's Board of Directors, BCBSM sent a letter to MSMS which described these new policies (CX 356–O–P). On July 9, 1977, the MSMS Committee on Third Party Carriers forwarded a special report to the MSMS Council, detailing its reactions to the new policies (CX 355). The report expressed gratification that, "after three years of continuing negotiations," BCBSM had offered proposals which suggested that the goals of the MSMS House of Delegates were feasible (CX 355–A). It can be inferred that the "goals" referred to were the MSMS goals of statewide screens and automatic profile updates. However, the report rejected BCBSM's new reimbursement policies because they applied only to participating physicians (CX 355–A–B). It also rejected BCBSM's cost-containment proposal (CX 355–C). The MSMS Council considered this report at its July 23, 1977, meeting, adopting a resolution that the BCBSM reimbursement policies be rejected "because they discriminate against nonparticipating physicians," but urging continued discussions with BCBSM (CX 182–F). **[46]**

213. Also at the July Council meeting, the Council was advised of the automobile manufacturers' vision care plan. Based on this report, the Council resolved that the appropriate MSMS committee immediately reiterate to BCBSM "the MSMS position that no distinction in fees be made between participating and nonparticipating physicians." It resolved further that "the committee immediately apprise the Council of the results of its discussion and, based on the committee report, that the Council consider calling a special meeting of the House of Delegates on this matter." Finally, it instructed the Council

Chairman to send a letter or telegram to BCBSM, informing it of the Council's actions (CX 182–Q–R).

214. Dr. Crandall wrote to Dr. Hayes on August 15, requesting a ten day moratorium before the implementation of reimbursement differentials (CX 637), and Dr. Hayes responded that, with respect to the vision care package, the automobile companies involved and the UAW would have to consent (CX 638). With regard to BCBSM's new physician reimbursement policies, BCBSM rejected the moratorium request, although BCBSM was willing to discuss options that might be more acceptable to MSMS (CX 638; RX 10; Crandall 1717).

215. Dr. Hayes wrote to MSMS again on August 29 to inform MSMS that Chrysler and Ford, and the UAW had rejected the proposed moratorium regarding the vision care program (CX 639).

216. The MSMS Council, at its next regularly scheduled meeting on September 7, 1977, decided to call a special meeting of the MSMS House of Delegates for October 26, 1977, to discuss these developments (CX 183). The Council also instructed MSMS attorneys to study potential legal actions against BCBSM and the parties to the automobile contracts. A resolution was passed informing BCBSM that MSMS would not participate in any discussions with BCBSM until the reimbursement issues were resolved. MSMS wrote its members to suggest that they individually withhold any decision or judgment on the new policies until there was a full discussion of them by MSMS, possibly at the special meeting (CX 362).

217. MSMS also sent a memorandum to the presidents of the component societies and specialty societies requesting that they ask their members to withhold decision or judgments concerning the new reimbursement policies until all the facts were disseminated (CX 364). This memorandum enclosed a "background paper" which stressed that "should a significant number of the presently participating physicians elect not to continue their participation, this could have an effect on the Blue Cross/Blue Shield's reimbursement policies" (CX 365–C).

218. The special meeting of the House of Delegates was held on October 26, 1977 (Hayes 434; CX 15; CX 94). Dr. Bass, MSMS' President stated that, "*** my one request to you is that [47] you act in a unified way to adopt new policies. You must be unified in the decisions that are reached today" (CX 15–L).

219. A resolution was passed stating that it was the MSMS position to encourage individual physicians to departicipate from BCBSM (Crandall 1723). Authorization was passed for the MSMS Council to recommend that physicians not use the BCBSM claim form (Crandall 1727–28).

220. The House of Delegates instructed the Negotiating Committee

to begin discussions with key BCBSM subscriber groups to provide direct "medical input" into service benefit programs, instructed the MSMS Council to urge Michigan employees to seek MSMS advice in selecting health insurance carriers; and resolved to authorize the Council to seek alternate health insurance for MSMS members to replace BCBSM group plans. The delegates resolved, in addition, that the Council undertake such legal actions as deemed appropriate, and membership dues were increased by $35 to this end (CX 15–Z–28; Z–64, Z–66; CX 94–A–B; Hayes 435).

221. *Medigram* headlines in the November 1, 1977 issue stated that MSMS recommended departicipation (CX 94–A–D; Crandall 1725). MSMS leadership also wrote every MSMS delegate, alternate, and county and specialty society president recommending departicipation (CX 556–B; CX 371–A). Members were instructed to send letters to Dr. Hayes, and were sent postcards on which they could indicate their decision to departicipate to be sent to MSMS.

222. Several MSMS component societies joined with MSMS to urge that physicians departicipate from BCBSM, and some engaged in specific actions to encourage or facilitate departicipation. The Ingham County Medical Society, an MSMS component (CX 257), advised its members that "your Delegates, along with the others in the Michigan State Medical Society House of Delegates, told Blue Cross/Blue Shield of Michigan what it could do with the new Reimbursement Policies and the Hearing and Vision Programs." It advised: "The big job ahead is going to be to convince all of the physicians, who are individuals with individual ideas, that this is the way to go" (CX 260–B). The Ingham County Society sent a mailing to its members urging that they departicipate (CX 258–B). On December 28, 1977, this component's executive director, acting in his official capacity (CX 262), sent a memorandum to Ingham County's MSMS delegates advising them that:

> To keep up the flow of non-participating letters to Blue Cross Blue Shield of Michigan objecting to the new Reimbursement Policies, the Executive Committee has suggested that the Delegates now make followup telephone calls to selected physicians or practicing groups who have not informed the Society that their letters have been sent (CX 261–A). [48]

The memorandum provides a list of "procedural guidelines" to assure that "everyone is operating on the same track" (CX 261–A–B). These guidelines advise delegates to inform Ingham County's executive director of any physicians who have already sent in departicipation letters, as well as the names of those who do not plan to departicipate (CX 261–B). Eleven "call lists" were distributed to Ingham County's MSMS delegates, each bearing the names and telephone numbers of

physicians to be contacted by a designated delegate (CX 261–C–M). In November and December 1977, Ingham County Medical Society received confirming copies of correspondence from Ingham County physicians and physician groups to BCBSM, advising BCBSM that the physicians and groups were formally departicipating from BCBSM, or that they would no longer participate on a per-case basis (CX 263–78; 280–88; 292–94; 296–301; 303–04; 306–08).

223. Kalamazoo Academy of Medicine is the MSMS component society for Kalamazoo County, Michigan (CX 327). Kalamazoo Academy's MSMS delegates reported the results of the MSMS House of Delegates special session to the Academy's Board of Directors at its November 1, 1977, meeting. A motion was adopted that a letter be sent to the Academy's membership by a special mailing, reporting the actions taken by the MSMS House of Delegates (CX 329–B). On November 4, 1977, a letter on Kalamazoo Academy stationery, signed by the Academy's MSMS delegates, was sent to the component society's membership (CX 328). In part it stated:

> [W]e now as a unified body recommend that you become a *non-participant* in BCBSM if you presently are a participating doctor. We advise you to drop your own personal medical insurance with BCBSM, and encourage your patients to do so, also (CX 328–A) (emphasis in original).

224. In September 1977, the Mason County Medical Society, another MSMS component society (CX 336), passed a resolution supporting MSMS' opposition to BCBSM's differential reimbursement policies (CX 378). In December 1977, Muskegon County Medical Society, also an MSMS component society (CX 343), published a message from its president in its monthly membership newsletter, urging "each and every physician" of the Muskegon County Society to immediately send a departicipation letter to BCBSM in support of MSMS House of Delegates' actions (CX 344–A).

225. Members of the St. Clair County Medical Society, an MSMS component society (CX 322), decided at that society's December 13, 1977, general membership meeting to draft and circulate a letter for individual physicians to execute and send to BCBSM as soon as possible announcing that they were resigning from participation, either formally, or per-case (CX 724–C). At a subsequent St. Clair Society executive committee meeting, those present were advised that 59 of 87 St. Clair County Medical Society members had signed departicipation letters and [49] submitted them to the county society. It was also reported that other members may have departicipated, but without sending copies of their letters to the county society (CX 325–A). In February 1978, the St. Clair Society forwarded 50 separate departicipation letters (some signed by more than one physician) to MSMS (CX

481–A–Z–25). Forty-three of these consisted of an identical form letter announcing to MSMS that the signing physician had cancelled his participation with BCBSM (CX 481–G–L, N–S, U–Z–25).

226. The Oakland County Medical Society, an MSMS component society (CX 309), held an emergency membership meeting in September 1977 to protest BCBSM's new reimbursement policies and the vision and hearing care programs (CX 318). On October 26, 1977, the Oakland County Society's Board of Directors agreed that a resolution by the society's MSMS delegates recommending that physicians departicipate from BCBSM be published in the society's next monthly magazine (CX 312–C). A "survey" was mailed to individual Oakland County Society members in November 1977, and was also published in the December 1977 edition of the Oakland County Society's magazine. Entitled "OCMS Says Departicipate Now," it advised members that the survey was designed to "determine how the membership is responding to the OCMS Board of Directors recommendation, as well as that of the Michigan State Medical Society, that physicians totally cease participation with Michigan Blue Cross and Blue Shield of Michigan" (CX 317; CX 483). In January 1978, the Oakland County Society sent a letter, signed by its president, to MSMS, urging that MSMS not soften its stand on departicipation, and advising MSMS that "the Oakland County Medical Society and the medical staffs of the major hospitals in the county have gone on record as urging complete departicipation" (CX 314–D). The Oakland County Society's Board of Directors subsequently passed resolutions in February 1978, supporting MSMS, and in March, continuing to urge departicipation (CX 315–B; CX 316–C).

227. Between November 1977 and June 1978, BCBSM received 410 letters from participating MDs cancelling their participation with BCBSM (Kaleal 1131; *see also, e.g.,* CX 263; 271; 273–75; 280; 283–84; 287–88; 293–94; 296–97; 299–300; 303–04; 307–08; 481–B; 503–A–B; 506–07; 515; 521; 531–32; 538; 540; 574–74; 576; 584; 598; 601–B; 608–09; 612–13; 615; 627–28); and another 980 letters from nonparticipating MDs, reaffirming their nonparticipating status (Kaleal 1131; *see also, e.g.,* CX 265; 268; 270; 276; 286; 292; 301; 306; 481–C–F; 502; 509; 511–14; 517; 519–20; 533; 539; 541–42; 544; 557–59; 564; 578; 580; 589; 591; 593; 595; 602; 604–05), with many advising further that MDs would not participate on a per-case basis (Kaleal 1131; *see also, e.g.,* CX 265; 276; 288; 300–01; 306; 512; 514; 517; 519–21; 533; 542; 557; 576; 580; 589; 591; 595; 602; 615). Many of these letters announced that participation, formal or per-case would terminate effective January 1, 1978, the termination date urged by MSMS (*see, e.g.,* CX 263–65; 270–74; 276–77; 280–85; 287–88; 297–300; 303; 307–08; 484–85; 488–91; 494; 496–[50]98; 500–02; 509; 515; 517; 519–21; 531–33; 536; 538; 540;

542–43; 557; 559; 567; 573–74; 576; 580; 583–85; 591–92; 595–96; 598; 601–B; 602–03; 608–09; 612–15; 620–22; 628–29). Some letters are identical photocopies of form departicipation letters (*see, e.g.,* CX 484–85; 488–91; 494; 496–98; 500–01), and many mention MSMS specifically or show copies being sent to either MSMS or a component society (*see, e.g.,* CX 268–69; 273–74; 276; 280; 284; 286–87; 292; 299; 306; 308; 481–C–F; 502; 507; 509; 511–12; 560–B; 578; 579–B; 585). In addition, most of the letters were addressed directly to Dr. Hayes of BCBSM, which MSMS had advised (*see, e.g.,* CX 270–71; 274–76; 280; 284; 286–87; 484–85; 488–91; 503–A; 509; 511–14; 531–32; 533; 538; Hayes 436).

228. According to Mr. Glasser of the UAW, the union received complaints from its members about their inability to receive vision care services from participating opthamologists (Glasser 531) because, in the first year after the vision care program was implemented, only 38 percent of opthamologists participated. It was his belief that, if optometrists were not included as alternative providers, the vision care program would have been crippled (Glasser 532).

229. After the special meeting of the House of Delegates in October 1977, the Division of Negotiations met with BCBSM representatives to discuss MSMS problems with the new physician reimbursement policies (Crandall 1725–26). A meeting was held on December 28, 1977, at which the parties expressed a desire for better communications between the two groups (CX 642–A).

230. Between August 17, 1977 and June 2, 1978, BCBSM had a net gain of 962 formally participating physicians (Kaleal 1142, 1162). Between November 1, 1977 and June 1, 1978, BCBSM received letters from Michigan physicians who supported the new policies (Kaleal 1126).

231. From November 1, 1977 to June 2, 1978, BCBSM received 2550 letters from physicians relating to the new policies; 1103 from physicians who signed new participation agreements, 410 from physicians who wanted to departicipate, 57 from physicians reaffirming their participation and 980 from physicians reaffirming their nonparticipation (Kaleal 1130).

232. As of April 1, 1978, the percentage of formally participating physicians was 62 percent (Hayes 721).

233. BCBSM was able to attract more physicians than departicipated as the result of the increased compensation it offered to participating physicians, and determined that it was unnecessary to undertake specific additional measures to counter the departicipation campaign (Hayes 440).

234. Due to BCBSM's continued refusal to extend the [51] statewide screen to nonparticipating physicians, on December 14, 1977, the

MSMS Council initiated actions designed to result in a request to members to cease filling out claim forms.

235. The MSMS Committee on Forms and Codes filed a report on December 27, 1977 which noted that it would be the patients who would potentially suffer the most harm if this action was taken (CX 452–A). The Committee suggested that, instead, MSMS might advise physicians to fill out only the minimum data required for processing:

> Advantages are a minimum of reprograming and disruption of office procedure, the structural maintenance of the uniform claim form, and the potential to confound the BCBSM system enough to demonstrate the physicians' concerns while still meeting the legal and ethical requirements for payment to patients (CX 452–B).

236. BCBSM believed that the refusal to fill out BCBSM's claim forms was more serious than the problems posed by departicipation (Hayes 440–41), because this would increase administrative costs and would lengthen the time necessary for payment of claims (Hayes 443). BCBSM believed that MSMS would eventually take this action (Hayes 443). A meeting was scheduled to avoid this problem (Hayes 444–45).

237. This meeting occurred on December 28, 1977. Attending were Mr. McCabe and Dr. Hayes of BCBSM, and Dr. Crandall and other MSMS representatives (CX 642).

238. It was MSMS' position that BCBSM must cease distinguishing between participating and nonparticipating physicians in its reimbursement policies (CX 381; CX 383; Hayes 447–48). BCBSM management was, at that point, unwilling to do so (CX 382).

239. MSMS agreed to delay action to give BCBSM time to respond (CX 381–A), and suggested to its membership that it defer departicipation until March 15, 1978 (CX 127–A). Despite these meetings between the parties, the differential reimbursement issue was not resolved.

240. On February 27, 1978, a letter from Drs. Bass and Crandall was hand-delivered to the BCBSM President, Mr. McCabe (CX 253). The letter stated that:

> [T]he MSMS Committee on Negotiations reaffirms the House of Delegates position that the Blues should apply all aspects of the physician's reimbursement program equally to participating and nonparticipating physicians.
>
> We must remind you, however, that the extension of our present recommendations that MSMS members continue to [52] participate on a per-case basis and continue to complete the BCBSM claim form will expire March 15 unless BCBSM restores full parity to the nonparticipating physicians (CX 253–D).

241. BCBSM requested that MSMS delay action until after March 15 (CX 254–B–C) in a letter which noted that although the BCBSM

Board of Directors had not eliminated differential reimbursement at its March 2, 1978 meeting, it had discussed the February 27 letter. BCBSM also advised MSMS that a recommendation would be considered by the appropriate BCBSM committees to apply the statewide screen to nonparticipating physicians. This would be considered at the April 1978 meeting of the BCBSM Board of Directors (CX 254–B).

242. In May of 1978, BCBSM implemented a statewide screen for all physicians, and MSMS agreed to cease collective action regarding departicipation and a potential refusal to fill out BCBSM claim forms. Pursuant to a written agreement dated May 3, 1978, which MSMS' House of Delegates approved at its session, the parties agreed that:

> BCBSM Management on May 11, 1978 will recommend to the BCBSM Board, immediate authorization to implement a statewide screen for all physicians to be effective July 1, 1978 (CX 11–Z–1),

and that

> Effective May 7, 1978, MSMS will urge cooperation on the Michigan Medical Claims Forms completion and discontinue its efforts to urge physician departicipation (CX 11–Z–1).

243. Four goals to be reached through collective action by both parties, were enunciated in the agreement: (1) An effective program to control health care costs should be implemented as soon as possible; (2) there will be an effective service benefit program; (3) reimbursement policy should be supportive of service benefit and cost containment principles; and (4) all physicians should be treated equally within a reimbursement system that is consistent with the above principles (CX 11–Z–1).

244. Dr. Crandall believed that the agreement was important because it gave MSMS an "identifiable target" within BCBSM with which to negotiate, and participating and nonparticipating doctors would be reimbursed equally when the four goals were reached (CX 11–Z).

245. He indicated his belief that the agreement was in large part the result of "*** the failure of Blue Cross/Blue Shield to reach their goal of 85 to 90 percent participation" (CX 11–Y–Z). **[53]**

246. In the summer of 1978, BCBSM implemented a statewide screen for nonparticipating physicians which increased BCBSM payments to those physicians by millions of dollars (Hayes 456–57).

247. Subsequent to the May agreement, deliberations were held between MSMS and BCBSM representatives to develop an "acceptable new approach to the Blues' system of reimbursement for medical care" (CX 398–A–C). A proposal dated January 15, 1979, was devel-

oped by these representatives (CX 398–F–I). The MSMS Council recommended to the membership that it be disapproved, but polled the MSMS membership to determine whether physicians accepted the proposal (CX 398–A; J–K). At the 1979 annual session of the MSMS House of Delegates, the delegates voted to reject the proposal.

248. It was the position of the MSMS House of Delegates that (1) the cost containment program was insufficiently precise, and (2) there were potential ramifications because of the then-pending FTC investigation that resulted in this litigation (Crandall 1738–39).

VI. MSMS ACTIONS REGARDING MICHIGAN MEDICAID

A. Reduction in Payments

249. In December of 1975, the Governor of Michigan issued an order calling for an eleven percent reduction in Medicaid payments because of a lack of funds (CX 173–N; CX 404–B). Although MSMS had, until that time, encouraged Michigan physicians to participate in the Medicaid program (CX 404–B), the Medicaid Liaison Committee recommended:

> That MSMS inform the Governor, all members of the Legislature, the Department of Social Services and the public media that, because of the 11 percent reduction in Medicaid payments, MSMS can no longer encourage its membership to participate in the Medicaid program and that it leaves up to each individual physician's discretion whether he wishes to provide medical care to Medicaid patients (CX 416–B; CX 173–N).

The MSMS Council approved this recommendation (CX 173–N).

250. On December 18, 1975, Dr. Siegel of the MSMS Medicaid Liaison Committee announced this recommendation to the news media and gave a statement which was forwarded to component society presidents and executives and to publication editors (CX 404). The statement was published in *Medigram* (CX 43–A–C).

251. At a 1977 House of Delegates meeting, Dr. Siegel commented that through his statement:

> ***MSMS announced that it could no longer encourage [54] physicians to participate in the Medicaid program, and left the decision to each individual physician's discretion. The results were predictable, as the number of participating physicians dropped dramatically forcing patients into emergency rooms and Medicaid mills and increasing dramatically the cost of the program (CX 413–A–B).

252. When the MSMS Medicaid Liaison Committee determined that the state intended to maintain the eleven percent reduction (CX 427–C–D), it demanded that the eleven percent be restored and that

reimbursements be raised to the 1976 Medicare screen level (CX 427–E).

253. MSMS warned state officials that physicians might refuse to treat Medicaid patients. Dr. Siegel stated that:

> I warned the state that if they continue to force physicians to subsidize the Medicaid program through such measures as continuation of the 11 per cent cut, they may find themselves able to save the entire $811 million appropriation (CX 427–E).

254. MSMS had collected Medicaid departicipation proxies during the summer and fall of 1976. (Findings 187, 190 *supra;* CX 411–F; CX 413–B). Although Dr. Siegel testified that he never threatened that they would be used (Siegel 1829) he did admit to telling the MSMS House of Delegates that he "waved" them in front of the Governor (Siegel 1845–46; CX 413–B).

255. In April 1977, one month prior to Dr. Siegel's 1977 House of Delegates remarks, Dr. Crandall, whose Division of Negotiations coordinated with the Medicaid Liaison Committee, and who served as a member of the Medicaid Liaison Committee in 1976 (CX 424–B), stated that the Medicaid Liaison Committee had threatened state legislators that MSMS would exercise the Medicaid proxies if the reimbursement issue could not be immediately resolved (CX 411–F).

256. In November 1976, the Michigan Attorney General threatened antitrust litigation against MSMS because it had collected and threatened to use the proxies (CX 411–F; CX 413–B–C; CX 170–A–B; CX 392; Siegel 1861).

257. In the August 12, 1977, *Medigram,* Dr. Siegel informed the membership that reimbursements would soon be increased to a parity level with Medicare and, if so, he believed "*** that Michigan physicians have an obligation to reopen their doors to Medicaid patients" (CX 413–C; CX 10–Z–6). He related a "remarkable fall" in physician participation to the MSMS announcement that it would no longer encourage physicians to participate in the Medicaid program (CX 88A). [55]

B. Per-Case Participation

258. The Michigan Department of Social Services advised MSMS that physicians treating Medicaid recipients should bill Michigan Medicaid directly for all covered services. However, MSMS was also told that physicians were free to terminate their relationships with Medicaid recipients at any time (CX 421–A; CX 424–A).

On March 10, 1976, the MSMS Council resolved that:

[I]t is the policy of MSMS that physicians may participate in Medicaid on a per-service basis and bill the Medicaid program or at their discretion be free to enter into a private pay agreement with the Medicaid-eligible patient; that implementation of this policy become a high priority of the Medicaid Liaison Committee in its Liaison with the State; and that the Medicaid Liaison Committee provide a progress report on this item to the House of Delegates May 1–2 (CX 175–D).

259. MSMS informed the Department of Social Services of this resolution (CX 419A–B) but the Department of Social Services refused to accede. Therefore, a resolution was offered at the 1976 House of Delegates annual meeting which stated that:

RESOLVED: That Michigan State Medical Society advise members to provide only emergency services for Medicaid patients until meaningful negotiations with Michigan Department of Social Services have achieved recognition of per-case participation as was originally agreed (CX 422–C).

The Department of Social Services replied that:

[We] know that a resolution has been prepared which would encourage MSMS members to take Medicaid clients only on an emergency basis unless physicians are allowed to participate in the program on a per service basis. If this resolution is passed and were adhered to by the majority of MSMS physicians, it probably would have a severe health and financial impact by reducing services rendered and the flow of Medicaid dollars to the medical community. On the other hand, it might increase costs by channeling many more Medicaid patients to the emergency wards of hospitals (CX 421–A).

260. The Department of Social Services also told the Medicaid Liaison Committee that:

Our position * * * is based on the premise that our clients are in fact, by definition, poverty stricken. The purpose of the Medicaid program is to provide these [56] people who have very limited means with the best available medical care with only a minimum of financial contribution on their part. Therefore, it would not be in the best interests of our clients' health or financial condition to allow medical providers the option of negotiating payment for services which are otherwise paid for by our program. To do so would invite all kinds of abuse by those few providers who are apt to victimize the Medicaid population (CX 421–A).

261. On April 30, 1976 the Medicaid Liaison Committee advised the MSMS Council that the Committee unanimously agreed to remain firm on the issue of per-case participation regarding Medicaid recipients. The Council adopted a resolution that a special meeting of the House of Delegates might be requested by the Council if the state took action against any individual physician who tried to participate on a per-case basis (CX 424–B; CX 176–O). At the 1976 House of Delegates annual meeting, the delegates authorized the Medicaid Liaison Com-

mittee to request a special meeting if any such action was taken (CX 426–B).

262. On May 6, 1976, MSMS members were informed by Dr. Robert M. Leitch, in his capacity as MSMS President, that:

[T]he Medicaid Liaison Committee obtained House approval to *noncomply* with the State's insistence that all Medicaid services must be charged to the State. *The Medicaid Liaison Committee now advises individual physicians in the State that it is MSMS policy that physicians may bill Medicaid on a per service basis* (CX 425) [emphasis in original].

263. In the year following, the State of Michigan took no action against any individual physician for noncompliance with the Michigan Department of Social Services policy (CX 413–B).

VII. MSMS' KNOWLEDGE THAT ITS ACTION MIGHT BE IN VIOLATION OF THE ANTITRUST LAWS

264. MSMS' attorney warned MSMS not to engage in collective bargaining of reimbursement terms with third party payers, either through its Negotiating Committee, or through the fiction of engaging in such negotiations through a separate medical guild or union. In a 1978 memorandum to the Council, he said:

The only purpose of such negotiations could be to raise, lower, stabilize or otherwise tamper with fees. This would put MSMS, its sponsored guild and perhaps individual physicians in a vulnerable position with respect to the antitrust laws. Indeed, we have repeatedly stated that the MSMS negotiations committee **[57]** in its ongoing relationships with Blue Cross/Blue Shield must walk a fine line; it can present its viewpoints as to services rendered by physicians the belief or opinion of organized medicine that certain fee systems and/or certain specific fees are inappropriately high or low, but it cannot, it must not, come to an agreement with a third-party payer as to fees to be charged. We emphasize this because the extant negotiating committee is already working in the area that we assume a guild or labor union would (CX 190–J).

265. The MSMS Council considered and stated its opposition to BCBSM's new reimbursement policies and the vision and hearing care reimbursement differentials at the July 1977 Council meeting (CX 182–E–G–R). At that same meeting, MSMS legal counsel warned that MSMS committees must "avoid the implied threat of organized boycotts or other sanctions by organized medicine." He stated that when advocating economic positions on behalf of MSMS, these committees should not stray "into threatening postures which could invite public disapprobriation and swift legal retribution" (CX 182–O).

266. At the October 26, 1977 special meeting of the House of Delegates, a delegate requested MSMS counsel to advise the delegates

whether the recommendation that physicians departicipate from BCBSM constituted a boycott (CX 15–Z–46). Counsel replied: "There is no question but that this type of action will probably elicit some sort of legal action against you" (CX 15–Z–46). Notwithstanding, the delegates then voted to recommend that physicians departicipate from BCBSM (Findings 219, 221 *supra*).

267. The Michigan Attorney General's response to MSMS' threat to exercise Medicaid nonparticipation proxies in 1976 was to declare that it was going to initiate an antitrust action against MSMS (Finding 256; CX 179–A–B; CX 411–F; CX 413–B–C). In November 1976, the MSMS Council held a special meeting to discuss the impending lawsuit, which was attended by among others, Drs. Griffin, Crandall and Siegel (CX 179–A). MSMS' attorney advised the council that MSMS' chances of winning such a suit were only about one in ten, but the Council elected to take no action to settle the affair (CX 179–B).

268. MSMS officials subsequently asserted that MSMS' willingness to risk litigation over the proxies proved the strength and unity of MSMS and Michigan physicians. Dr. Crandall stated:

> Allegedly MSMS was in violation of restraint of trade because of the possession and threatened utilization of the nonparticipation proxies in the Medicaid program. MSMS was asked to sign a consent judgment that would fully strip MSMS of any ability to negotiate or speak [58] collectively for Michigan physicians. Despite legal counsel advice, the MSMS council elected not to sign any consent judgment but to let the lawsuit take its ultimate course.
>
> *** MSMS refused to back down from its previous position. If the lawsuit had been pursued, the Attorney General would have orchestrated the demise of the entire Michigan Medicaid program as the majority of Michigan physicians would have withdrawn from the program individually. But all parties agreed the lawsuit would not be pursued if MSMS agreed not to initiate the proxies at that time. This action clearly demonstrates the significant clout MSMS and the state's physicians have if they will work in unison (CX 411–F–G).

LEGAL DISCUSSION

I. Section 4 Jurisdiction

The Federal Trade Commission's jurisdiction over corporations, under Section 5(a)(2) of its enabling statute, is limited by Section 4 to the following:

> any company, trust *** or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust *** or association, incorporated or unincorporated without shares of capital stock or capital stock or

certificates of interest *** which is organized to carry on business for its own profit or that of its members.

(15 U.S.C. 44).

Respondent cites *Community Blood Bank* v. *F.T.C.,* 405 F.2d 1011 (8th Cir. 1969), to support its position that the Commission lacks jurisdiction over the activities of respondent which form the basis for the complaint in this case, since MSMS is not engaged in activities which result in profits which are distributed to its members.

For purposes of this decision, however, this point has been settled by the Commission in *American Medical Ass'n.,* 94 F.T.C. 701, 982–93 (1979), *aff'd,* 638 F.2d 443, 447–48 (2d Cir. 1980). In that case, the Commission upheld the ALJ's [59] ruling that jurisdiction could be asserted over nonprofit organizations "whose activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization rather than merely incidental to some non-commercial activity," 94 F.T.C. at 983.

In this connection, MSMS has promoted its members' financial interests by lobbying for proposed legislation to increase Medicaid payments to physicians (Finding 48); and to lower the cost of physicians' malpractice insurance (Finding 49). It claimed responsibility for legislation preventing chiropractors from legally enlarging the scope of their operations (Finding 44). It successfully pursued an amendment to the Michigan Single Business Tax statute, thus reducing state income tax liability for physicians (Finding 51).

MSMS also litigated a suit on behalf of its members to prevent BCBSM from lowering its reimbursements for outpatient psychiatric services (Finding 57), it intervened in a lawsuit between BCBSM and the Insurance Commissioners of Michigan where the result could have affected physician reimbursements (Finding 57), and it participated in various other lawsuits where the economic interests of its members would be affected by the outcome (Findings 57 through 60).

MSMS created the Michigan Physicians Mutual Liability Insurance Company to make professional liability insurance available to physicians at reduced rates (Findings 61 through 64). It publishes *Michigan Medicine* and *Medigram,* both of which contain articles and information about economic issues of interest to its members (Findings 65–67). It also conducts a public relations effort on behalf of physicians (Findings 68–70).

MSMS offers seminars and workshops (at reduced cost to members) on financial management and techniques to increase the efficiency and productivity of medical practices (Findings 71 to 73).

The Physicians Service Group, a wholly-owned for-profit MSMS subsidiary, features a credit card office payment plan at a group

discount rate, a bill collection service, loans, and financial and estate planning, etc. (Findings 74 to 76).

Through the aegis of MSMS, members may obtain insurance programs (Finding 77), retirement plans (Finding 78), auto leasing and discount car rental programs (Finding 79), continuing medical education at a lower cost to members than nonmembers, and vacation plans, etc. (Findings 80 and 81). **[60]**

In addition, because membership in MSMS enables physicians to join AMA, MSMS members are thus eligible to receive the valuable benefits available through the national organization. See 94 F.T.C. at 988–89.

It should be recognized that in *National Commission on Egg Nutrition* ("NCEN"), the Commission held that while the FTC "*** properly exercises jurisdiction over such nonprofit corporations as trade associations which carry on business for the sake of their members, it may not exercise jurisdiction over nonprofit corporations which are organized and actually engaged in business for purely charitable purposes." 88 F.T.C. 89, 175, *aff'd* 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). It is abundantly clear from the above summary that many of MSMS activities cannot be described as "purely charitable."

In *NCEN,* among the factors considered relevant in determining jurisdiction were: the original stated purpose of the organization; sources of funding; publications; activities; relations with profit oriented parties; and tax status. 88 F.T.C. at 177. Significantly, when MSMS was established in 1910, one of its stated purposes was to foster the material interests of Michigan physicians (Finding 7). The 1978 Constitution and Bylaws has, as one of its stated goals, the advocacy of "fair remuneration for services rendered" (Finding 9).

As discussed above, MSMS commercial activity is not merely "incidental" to its other activities. The formation of Physician's Service Group clearly illustrates this. It is also significant that MSMS is exempt from federal income taxation under Section 501(c)(6) of the Internal Revenue Code (Finding 43) which exempts "business leagues, chambers of commerce, real estate boards and boards of trade," rather than under Section 501 (c)(3) of the Code, which exempts organizations formed and operated solely for religious, charitable and scientific purposes (Finding 43). *See AMA,* 94 F.T.C. at 989. *Ohio Christian College,* 80 F.T.C. 815 (1972).

For the above reasons, I must reject respondent's contention that it is exempt from the Commission's jurisdiction.

II. Interstate Commerce

Respondent argues that its activities do not satisfy the "commerce" requirements of the Federal Trade Commission [61] Act. However, there is sufficient evidence in this case to reject this contention, with respect to both actions "in commerce" and "affecting commerce." The record shows the following:

(a) *Medicaid* — In fiscal years 1977 and 1978, Michigan Medicaid disbursed approximately $110 million and $120 million, respectively, to physicians in the state. Half of that amount was composed of federal funds originating in Washington, D.C. (Findings 84 and 89).

(b) *Federal Employees Health Benefits Program ("FEHBP")* — The federal government provides health insurance benefits to its employees through contracts with various insurers, including BCBSM (Findings 84 and 91). When BCBSM pays Michigan physicians for services rendered to federal employees, the money is forwarded into the state from the National Association of Blue Cross and Blue Shield Plans, in Chicago, Illinois (Findings 91 and 94). In 1977 and 1978, NAPCBSP paid BCBSM $30 million for services provided to the 36,000 federally covered individuals in Michigan (Finding 94). Changes in BCBSM's reimbursement rates would naturally affect these amounts.

So too, because the FEHBP premiums are computed upon expenditures, and a uniform premium rate is charged to subscribers nationwide, changes in BCBSM payments of benefits would affect premiums paid across state lines (Finding 95).

(c) *National Accounts* — BCBSM is involved in some 250 national accounts (Finding 101). Over half of these use the "equalization" method to set per capita premium rates (Finding 101). This means that the premium paid by each employee is based on total benefit expenditures, and a single rate is charged regardless of the state in which the employee lives (Finding 102). Therefore, changes in BCBSM reimbursement rates to physicians would affect commerce from this standpoint.

In addition to the above, the record shows that officers and representatives of MSMS have traveled across state lines in their efforts to gather support from other medical societies, and have used the United States mail to this end (Findings 107 and 108).

The mail was also used by MSMS for proxy and departicipation solicitations (Finding 108), to correspond with MSMS' members to keep them informed of developments in MSMS' struggle with BCBSM. [62]

Goldfarb v. *Virginia State Bar,* 421 U.S. 773 (1975), involved the legality of a minimum fee schedule for title searches performed by

attorneys. This schedule was imposed by the local bar organization. The facts showed that a significant portion of funds for purchasing homes in Virginia came from outside the state, and significant numbers of home loans were guaranteed by federal agencies in Washington, *e.g.,* the Veterans Administration and the Department of Housing and Urban Development. Therefore, the Supreme Court found a sufficient nexus to interstate commerce to support jurisdiction. 421 U.S. at 783. The Court further held that when the requisite effect on interstate commerce is shown, no specific magnitude need be proved. 421 U.S. at 785.

In *McLain* v. *Real Estate Board of New Orleans,* 444 U.S. 232 (1980), the Supreme Court interpreted its holding in *Goldfarb. McLain* involved allegations concerning "a continuing combination and conspiracy among respondents to fix, control, raise, and stabilize prices for the purchase and sale of residential real estate***." The Court held:

> On the record thus far, it cannot be said that there is an insufficient basis for petitioners to proceed to trial to establish Sherman Act jurisdiction. It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated in their deposition testimony that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by [63] interstate corporations. Reading the pleadings, as supplemented, most favorably to petitioners, for present purposes we take these facts as established.

444 U.S. at 245.

In *McLain,* the district court had found that, under *Goldfarb,* a substantial volume of interstate commerce must be involved, and that the challenged activity must be inseparable from its interstate aspects for jurisdiction to exist. The Supreme Court disagreed, and held that the authority of Congress under the commerce clause extends beyond activities in interstate commerce to reach activities which ". . . while wholly local in nature, nonetheless substantially *affect* interstate commerce." [emphasis in original] 444 U.S. at 241.[10]

[10] It is interesting to note that in the district court, an affidavit had been filed by a loan guarantee officer of the Veterans' Administration disclosing that VA-insured loans for residential purchases in the Greater New Orleans area for the years 1973–1975 amounted to $46.3 million, $45.9 million, and $53.5 million, respectively. 444 U.S. at 237.

It is unnecessary to show that the unlawful conduct itself had an effect on interstate commerce, nor is jurisdiction restricted to activities with an integral relationship to activity in interstate commerce when only an effect on interstate commerce is alleged. *McLain, supra,* 444 at 241, 243.

For the above reasons, the "commerce" requirements of the statute have been satisfied.

III. MSMS Has Engaged In An Unlawful Conspiracy

There is no doubt that the activities of professional societies and their members have been deemed to be subject to scrutiny under the antitrust laws. The initial step in determining whether such activities constitute a violation of these laws is the selection of the appropriate standard of review, *i.e.* the *per se* rule or the rule of reason.

Complaint counsel argue that the *per se* rule is applicable, because the instant case involves horizontal agreement by respondent, some of its component societies and **[64]** some of the members of each, to fix prices and to boycott third-party payers, and that such agreements have traditionally been held to be *per se* violations of the antitrust laws.

Historically, price-fixing agreements and boycotts have been considered quintessential examples of anticompetitive behavior. This is because the violence they perpetrate against competition has been viewed as so severe.

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade the [Supreme] Court has held that certain practices are so "plainly anticompetitive" *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978); *Continental T.V. Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), and so often "lack any redeeming virtue", *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979).

"A horizontal agreement to fix prices is the archetypal example of such a practice. It has been long settled that an agreement to fix prices is unreasonable *per se.* It is no excuse that the prices fixed are themselves reasonable". *Catalano, Inc.* v. *Target Sales, Inc.,* 100 S.Ct. 1925, 1927 (1980). *See United States* v. *Trenton Potteries Co.,* 273 U.S. 392, 397 (1928); *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 340–341 (1897).

Such agreements, the nature and necessary effect of which are so plainly anticompetitive that no elaborate study of the industry in

which they occur is needed to determine their illegality, are violations *per se*. However, a recent line of cases, while recognizing that the actions of professionals and professional associations are subject to antitrust scrutiny, has held that activities which might constitute *per se* illegalities in the context of the sale of commodities, might require more extensive investigation, *i.e.,* application of the rule of reason, where professional services are involved. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). The practice of professions is not automatically interchangeable with business, *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 687 (1978), and, therefore, the competitive effect of agreements in these **[65]** professions may be evaluated by examining the facts peculiar to the professions. The newness of review of professional activities, and the special considerations involved in the delivery of health services have made several courts reluctant to adopt a *per se* rule of illegality. *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia,* 1980–2 Trade Cases (CCH) ¶ 63,395 at p. 76,012–13 (4th Cir. 1980) [624 F.2d 476]. *Arizona* v. *Maricopa Medical Society,* 1980–1 Trade Cases (CCH) ¶ 63,239 at p. 78, 154 (9th Cir. 1980) [643 F.2d 553].

The actions of respondent MSMS, therefore, will be examined under the rule of reason.

Under the rule of reason, attention is focused on the impact of the challenged restraint on competitive conditions. "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *National Society of Professional Engineers, supra,* 435 U.S. at 688.

Certain practices by members of a profession might survive scrutiny under the rule of reason even though they would be viewed as a violation of the Sherman Act in another context. *Goldfarb, supra,* 421 U.S. at 788–89. However, the *Goldfarb* case does not fashion a broad exception under the rule of reason for the professions. *National Society of Professional Engineers, supra,* 435 U.S. at 696.

The Commission's complaint charges that respondent, some of its constituent societies, and some of its members, have unlawfully conspired to fix prices paid by, and to boycott, third-party payers BCBSM and Michigan Medicaid.

To support a charge of unlawful price fixing, it is necessary to demonstrate that the activities cited had the potential effect of raising, lowering, or stabilizing prices, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940), even though the members of the price-fixing group are in no position to control the market.

"The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding or enlisting others

to withhold patronage or services from the target." *St. Paul Fire & Marine Insurance Co.* v. *Barry,* 438 U.S. 531, 541 (1978). The ordinary meaning is a concerted refusal to deal. **[66]**

Individuals may do many things independently and, thus, legally, which they may not combine with others to accomplish. *De Jong Packing Co.* v. *United States Department of Agriculture,* 618 F.2d 1329, 1335 (1980). *Joseph E. Seagram & Sons, Inc.,* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 76 (9th Cir. 1969), *cert., denied,* 396 U.S. 1062 (1970). "What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action; to obtain by concert of action market power not possessed by the purchasers individually and, by exercise of that market power, to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces." *De Jong Packing, supra,* 618 F.2d at 1335.

The target of the boycott need not be a competitor of the boycotters to run afoul of the antitrust laws. *Indiana Federation of Dentists, supra,* Initial Decision, Docket 9118 at p. 88 [101 F.T.C. 54]. Concerted refusals to deal are held unlawful in cases where the target is a customer of some or all of the conspirators, and the target is denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the "sellers." *St. Paul Fire & Marine Insurance Co., supra,* 438 U.S. at 543.

It is obvious that MSMS, and many of its constituent societies and members, have engaged in a conspiracy to boycott against Michigan Medicaid and BCBSM. By threatening to cease treating Medicaid patients (Findings 249–262), to cease filling out BCBSM claim forms, (Findings 219 and 234) and to cease participation in BCBSM (Findings 219–228) respondent endeavored to extract concessions from these third-party payers which would not otherwise be forthcoming. Its aim was to obtain higher reimbursements for treatment of Medicaid patients; to eliminate differential treatment by BCBSM of participating and non-participating physicians; and to eliminate regional differentials in reimbursements. By and large, respondent was successful in obtaining its aims by the use of such tactics.

Respondent cites many reasons and rationalizations for its actions regarding third-party payers, but the only defense to a finding of restraint of competition under the rule of reason is that the challenged activities had some procompetitive effect. Respondent has failed to introduce evidence of this. Laudatory social purposes are irrelevant in this connection. *Indiana Federation of Dentists,* Initial Decision, Docket 9118 at p. 88 [101 F.T.C. 54]. Under the prevailing law, the only factors which can be weighed against the anticompetitive effects of respondent's actions are possible procompetitive **[67]**

effects, not public policy considerations. *National Society of Professional Engineers,* 435 U.S. at 692–93. If respondent is convinced that the nature of its profession, the nature of BCBSM as a monopsonist, or any other public policy factor compels and justifies its being shielded from the antitrust laws, its recourse is to appeal to Congress. *National Society of Professional Engineers, supra,* 435 U.S. at 689.

Respondent argues that its challenged actions were legitimate, because any "alleged price tampering was ancillary to an otherwise valid commercial purpose." (Respondent's Trial Brief at 29). Respondent relies on *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers,* 562 F.2d 130 (2d Cir. 1977), which held that an ancillary restraint will be tolerated under the rule of reason if reasonably necessary to the legitimate primary purpose of the arrangement; is of no broader scope than reasonably necessary; does not unreasonably effect competition in the market place; and is not imposed by a party or parties with monopoly power.

It is obvious that respondent's activities are not permissible as an ancillary restraint. Respondent asserts that it acted in reaction to the "unreasonable and anticompetitive" behavior of BCBSM. However, the primary purpose of respondent's activities was what respondent eventually accomplished: an increase in reimbursement from Michigan Medicaid and the elimination of regional and participating/nonparticipating physician reimbursement distinctions. The fact that 80% of all Michigan physicians were members of MSMS (Finding 1), gave Respondent sufficient "clout" to extract these concessions.

Despite the fact, as it turned out, that there was no overall decrease in physician participation (Finding 230), nevertheless anticompetitive effects and consumer injury did result from MSMS's actions. Michigan Medicaid increased its reimbursement to physicians. Differential reimbursement to doctors in different regional areas was eliminated, at a cost of "millions of dollars" to BCBSM (Finding 246). As a matter of logic, this will lead to higher BCBSM premiums. [68]

Health and safety factors can be considered under the ancillary restraint doctrine even where the restraints on the market do not enhance competition, *Tripoli Co.* v. *Wella Corp.,* 425 F.2d 932, *cert. denied,* 400 U.S. 831 (1970), but public policy type arguments do not suffice. *National Society of Professional Engineers, supra,* 435 U.S. at 692–693, 696 n.22. Arguments that Respondent's conduct was defensive, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951), or designed to fight unfair or illegal conduct by other parties, *Fashion Originators' Guild of America* v. *Federal Trade Commission,* 312 U.S. 457 (1941) are irrelevant.

Complaint counsel have established that MSMS conspired with its members and component societies to restrain competition. "It is now

well established that an organization of professionals whose members accept and follow anticompetitive organizational policy declarations may be found to have conspired with its members to that end." *Indiana Federation of Dentists, supra,* Docket 9118 at p. 36 [101 F.T.C. 54].

Parallel action may be evidence of a conspiracy. The close similarity of letters sent by parties supposedly acting independently (Finding 227), as found in this case, lends credence to the view that they were aware of each other's actions and were acting in concert.

> While mere conscious parallel action is not sufficient to demonstrate conspiracy, neither is express agreement required; it is enough that knowing that concerted action was contemplated or invited [the defendants] gave their adherence to the scheme and participated in it.

De Jong Packing Co., supra, 616 F.2d at 1354. *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946). The agreement may be shown by concerted action, the parties working together with a single design for the accomplishment of a common purpose. The common design is the essence of the conspiracy or combination whether the parties act separately or together, or by common or different means, so long as they seek the same result. *American Tobacco, supra* at 809. And it is not necessary to find that the concerted activity was successful. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 224–25, n. 59. **[69]**

To find unlawful conspiracy, it is necessary that there be two or more individuals or entities attempting to accomplish a lawful or unlawful objective through unlawful means. *Pettibone* v. *United States,* 148 U.S. 197, 203 (1893). Where concerted action is encouraged by a central coordinating party and those who participate know that their activity is necessary for success of the plan, a conspiracy can be found to exist. It is not necessary to show that participation was coerced or that co-conspirators would be subject to punishment for withdrawing from the conspiracy. *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226–27 (1939). The parties may be engaged in uniform or different activities to further the plan, and the identities of the conspirators may change during the conspiracy. *Craig* v. *United States,* 81 F.2d 816, 822 (9th Cir.), *cert. denied,* 298 U.S. 690 (1936).

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators" *Interstate Circuit, supra,* 306 U.S. at 226–27. Once a conspiracy is established only "slight evidence" is needed to connect any particular participant. *United States* v. *Cadillac Overall Supply Co.* 568 F.2d 1078, 1087 (5th Cir.), *cert. denied,* 437 U.S. 903 (1978).

Organizations such as MSMS, with its many physician members, inherently consist of two or more persons, and are, therefore, combi-

nations. *American Column & Lumber Co.* v. *United States,* 257 U.S. 377, 399 (1921). Thus, when a trade association agrees or combines with some of its constituents or component societies to accomplish some anticompetitive, unlawful objective, *e.g.* a boycott or attempt to tamper with prices or terms of reimbursement, a conspiracy necessarily results. *United States* v. *National Society of Professional Engineers,* 389 F.Supp. 1193, 1201, 1216 (D.D.C., 1974), *vacated,* 422 U.S. 1031 (1975), *aff'd. on remand,* 404 F.Supp. 457 (D.D.C. 1975), *aff'd,* 435 U.S. 679 (1978). *Indiana Federation of Dentists,* Initial Decision, Docket 9118, at 36–37 [101 F.T.C. 54].

I so find in this case.

IV. Respondent's Affirmative Defenses Are Without Merit

A. Respondent's Activities are not protected under the *Noerr* Rule

Respondent MSMS argues that the actions it took in its dispute with Michigan Medicaid (Findings 249 through 263) may not be found to violate the antitrust laws, because these activities constituted protected activity under the doctrine established in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight,* 365 U.S. 127 (1961) (hereinafter "Noerr"). **[70]**

That case involved a struggle between railroad and trucking interests, in which the railroads were accused of unlawfully conducting a "publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices" inimical to the trucking industry. 365 U.S. at 129. The Supreme Court ruled that:

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

365 U.S. at 136.

The Court based its decision on two grounds:

> (1) In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.
>
> (2) The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

365 U.S. at 137–38.

Accordingly, the intent of the defendants to injure the trucking industry was held to not preclude their right to inform government officials of their opinions regarding the passage or enforcement of laws. 365 U.S. at 139. However, the Court expressly excluded from its holding those situations where ostensible activity to influence government action was merely a "sham" to cover action designed to injure the business relationships of a competitor. 365 U.S. at 144. [71]

In addition, the Court pointed out that an association of two or more persons in an attempt to influence legislation, the end result of which might be a restraint on trade or a monopoly, is essentially dissimilar from "*** the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements and other similar arrangements." [citation omitted] 365 U.S. at 136.

The Supreme Court subsequently considered the *Noerr* rule in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); and in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

In *Pennington,* a small mining company claimed there was a conspiracy involving the United Mine Workers ("UMW"), several large mining companies and the U. S. Secretary of Labor to drive small mining companies out of business. It was contended, *inter alia,* that the UMW and the large operators had jointly lobbied the Secretary of Labor to secure business policies unfavorable to small mine owners. Concerning this effort, the Court stated:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

381 U.S. at 670

In *California Motor Transport Co.,* it was alleged that highway carriers engaged in a joint campaign of administrative and judicial harassment to prevent rivals from obtaining operating rights. The Supreme Court, assuming the *Sacramento Coca-Cola Bottling Co.* v. *Chauffers Local 150,* 440 F.2d 1096 (9th Cir. 1971). For a review of authorities on this point, *see In re Airport Car Rental Litigation,* 474 F.Supp. 1072, 1079–83 (N.D. Cal. 1979).

In the case-at-bar, respondent MSMS was dealing with Michigan Medicaid in the latter's capacity as a purchaser of medical services for eligible individuals. The "political expression" activity cases relied on

by respondent are therefore [72] inappropriate.[11] Moreover, the *Noeer* rule should not be construed to sanction attempts to deal with government officials "by means of threats, intimidation and other coercive measures" *Sacramento Coca-Cola, supra,* 440 F.2d at 1099.

B. Respondents Activities Are Not Exempt From Antitrust Scrutiny Under The McCarran-Ferguson Act

Under the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq,* the nation's antitrust laws are applicable to the business of insurance only to the extent that such business is not regulated by state law. Respondent contends that its activities are protected by that statute.

In support of its position, respondent cites *Bartholomew* v. *Virginia Chiropractors Ass'n,* 1980–1 Trade Case ¶ 63,075 (4th Cir. 1979) [612 F.2d 812]. In that case, certain health care insurers, the American Chiropractors Association (ACA) and the Virginia Chiropractors Association (VCA) established a peer review system to determine reimbursement of insurance claims. Under this system, when a patient's bill was sent to his insurer for reimbursement, the insurer forwarded the bill to the VCA for consideration of the peer review committee as to usual and customary charge for the particular service rendered. Disputes between the patient and the insurer were resolved by ACA. (1980–1 Trade Case at p. 77,332). The circuit court found that the defendants' actions "touched upon 'the business of insurance'," (1980–1 Trade Cases at p. 77,335), distinguishing the case from *Group Life & Health Ins. Co.* v. *Royal Drug Co.,* 440 U.S. 105 (1979), and stating: [73]

> This conclusion does not trespass upon the teachings of [*Royal Drug*]. In that case there were two segregated and disparate operations: one, the offering of insurance, and the other, the procurement of drugs, admittedly an act only thinly tangential to insurance*** In the present instance, there is an integration of component acts resulting in a single, composite business—insurance.

1980–1 Trade Cases at p. 77,335.

Respondent MSMS argues that *Bartholomew* presents a factual situation very similar to that in the instant case, in view of the formation and activities of MSMS' Physician's Liaison Committee. This committee met with BCBSM to enunciate four goals to be reached through collective action by both parties (Finding 243).

As noted by complaint counsel (in its Brief Supporting the proposed

[11] *See Missouri* v. *NOW, Inc.,* 620 F.2d 1301 (8th Cir. 1980); *Subscription Television, Inc.* v. *Southern California Theater Owners Ass'n,* 576 F.2d 230 (9th Cir. 1978); *Crown Central Petroleum Corp.* v. *Waldman,* 486 F. Supp. 769 (M.D. Pa. 1980) rev'd on other grounds, 1980–81 Trade Cases CCH ¶ 63635 (3rd Cir. 1980) [634 F.2d 127]; *Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220 (1975).

Findings of Fact and Conclusions of Law, p. 60), this defense was not pleaded in respondents' Answer and Affirmative Defenses, and was not otherwise argued by respondent except for a reference in its trial brief.

However, it is clear that MSMS is not in the "business of insurance," despite the discussions which occurred between BCBSM and, on the part of MSMS, the Physician's Liaison Committee (Finding 243). An insurance contract is defined in *Royal Drug* as one which involves spreading and underwriting of the policy holder's risk. 440 U.S. at 211. In that case the Court noted that the McCarran-Ferguson Act was concerned with the relationship between the insurer and the insured. 440 U.S. at 215–216.

But even if these activities of MSMS be considered as "insurance" under McCarran-Ferguson Act, that Act expressly provides that nothing in it is to render the federal antitrust laws inapplicable to any "agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1013(b). *Indiana Federation of Dentists,* Docket No. 9118, at p. 22–23 [101 FTC 54]. *St. Paul Fire & Marine Insurance Co.* v. *Barry,* 438 U.S. 531 (1978).

McCarran-Ferguson, therefore, in no way shields respondent from liability in this case. **[74]**

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over respondent and over the subject matter of this proceeding.

2. The respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act and is subject to the jurisdiction of the Federal Trade Commission.

3. The challenged acts practices and methods of competition of respondents are in, and affect, commerce within the meaning of the Federal Trade Commission Act.

4. Respondent has conspired with some of its members, and with individual component societies, and has acted as a combination of its members to restrain competition among physicians in the State of Michigan by:

a. Fixing, stablizing, or otherwise tampering with the fees which physicians in Michigan receive for their services.

b. Engaging in concerted action to restrict, regulate, impede, or interfere with the health care cost containment and reimbursement policies of third-party payers for physicians' services, including Blue Cross and Blue Shield of Michigan and the Michigan Medicaid program.

c. Engaging in concerted negotiations with Blue Cross and Blue Shield of Michigan, with respect to the health care cost containment or reimbursement policies of Blue Cross and Blue Shield of Michigan

5. The above combination or conspiracy, and the acts and practices committed in furtherance thereof, have eliminated, restricted, restrained, foreclosed and frustrate competition [75] among physicians and have caused substantial injury to the public.

6. The combination or conspiracy, and the acts and practices committed in furtherance thereof, constitute unfair methods of competition, and unfair acts or practices in or affecting commerce and are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

7. The Order entered in this proceeding is necessary to remedy the violations of law committed by the respondent and to protect the public now and in the future. [76]

Order

I.

Definitions

It is ordered, That for purposes of this order the following definitions shall apply:

A. *MSMS* means Michigan State Medical Society, its House of Delegates, Council, committees, officers, representatives, agents, employees, successors and assigns.

B. *Third-party payer* means any person, corporation, government agency or other entity which agrees to pay for or reimburse all or part of any expense for physicians' services incurred by another person or group of persons. *Third-party payer* includes, but is not limited to, Blue Cross and Blue Shield of Michigan, and Medicaid.

C. *Medicaid* means the program of health care for indigent persons created by Title XIX of the Social Security Act, entitled "Grants to States for Medical Assistance Programs," 42 U.S.C. 1396 [77] *et seq.* (1976 & Supp. III 1979), including regulations, policies and procedures of Michigan that implement the program in Michigan.

D. *Reimbursement* means money paid by a third-party payer for physicians' services.

E. *Physician* means a doctor of medicine or of osteopathy.

F. *Participation agreement* means any agreement between a third-party payer and a physician in which the third-party payer agrees to pay the physician for the provision of physicians' services and in

which the physician agrees to accept payment from the third-party payer for the provision of physicians' services.

II.

It is further ordered, That MSMS shall cease and desist from:

A. Entering into or attempting to enter into any agreement or understanding, either express or implied with any MSMS members to affect or [78] attempt to affect the amount, manner of calculating, or terms of reimbursement, including, but not limited to, any agreement or understanding that:

1. any MSMS members will cancel or refuse to enter into participation agreements;
2. any MSMS members will refuse to complete claim forms used by any third-party payer;
3. MSMS can act on behalf of any members through proxy, power of attorney, or otherwise, to cancel or refuse to enter into any participation agreement; or
4. any MSMS members will sign or enter participation agreements only on terms acceptable to MSMS or to any other MSMS member.

B. Advocating, suggesting, urging, advising, inducing or recommending that any MSMS members engage in any action to affect or attempt to affect the amount, manner of calculating, or terms of reimbursement, including, but not limited to, advocating, [79] suggesting, urging, advising, inducing or recommending that any MSMS members:

1. cancel, or refuse to enter into, a participation agreement with any third-party payer;
2. refuse to complete claim forms used by any third-party payer;
3. agree to permit MSMS to act on behalf of any MSMS members through proxy, power of attorney, or otherwise, to cancel, or refuse to enter into, any participation agreement; or
4. sign or enter participation agreements only on terms acceptable to MSMS or to any other MSMS member.

C. Entering into or attempting to enter into any agreement or understanding, either express or implied, with any third-party payer concerning the amount, manner of calculating, or terms of reimbursement, or the terms or conditions of any participation agreement. [80]

D. Acting or purporting to act as an agent for or representative of any MSMS members concerning their position with respect to the amount, manner of calculating, or terms of reimbursement, or con-

cerning their decision to accept or reject the terms or conditions of any participation agreement.

E. Making any express or implied threat of acts by any MSMS members, or engaging in any other acts, with the purpose or effect of coercing, compelling or inducing any third-party payer to accept a position taken by MSMS or any MSMS members concerning the amount, manner of calculating, or terms of reimbursement, or the terms or conditions of any participation agreement.

III.

It is further ordered, That this Order shall not be construed to prevent MSMS from:

A. Participating in professional peer review of fees charged by individual physicians in individual cases. [81]

B. Engaging in *bona fide* exercise of rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

C. Responding to a request for information or opinion by any third-party payer.

IV.

It is further ordered, That MSMS:

A. Mail a copy of this Decision and Order to each of its component societies, each of its specialty sections, and each of its members within thirty days following service of this Order.

B. Publish this Order on the first pages of an issue of *Michigan Medicine* published no later than 60 days after the date the Order is served, and on the first pages of the first *Medigram* published after the Order is served. The Order shall be [82] published in the same type size normally used for articles which are published in *Michigan Medicine* and in the *Medigram.*

C. For a period of ten years, provide each new MSMS member with a copy of this Decision and Order at the time the member is accepted into membership.

D. Require, as a condition of affiliation with MSMS, that any component society or specialty section agree by action taken by its governing body to be bound by the provisions of Parts I–III of this Order.

V.

It is further ordered, That MSMS shall file a written report with the Commission within ninety days of the date of service of this Order, and annually on the anniversary date of the original report for each of the five years thereafter, and at such other times as the Commission may by written notice to MSMS require, setting forth in detail the manner and form in which it has been complied with this Order. [83]

VI.

It is further ordered, That MSMS shall notify the Commission at least thirty days prior to any proposed change to itself, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this Order.

Opinion of the Commission

By Clanton, *Commissioner:*

I. Introduction

This case involves allegations that direct competitors, acting through a professional association, conspired to restrain trade by organizing boycotts and tampering with the fees received from third party insurers of their services. Of particular antitrust significance is the fact that the competitors are medical doctors practicing in Michigan, the association is the Michigan State Medical Society, and the insurers are Blue Cross and Blue Shield of Michigan ("BCBSM") and Michigan Medicaid.

More specifically, the complaint in this matter charges, and the administrative law judge found, that the medical society unlawfully conspired with its members to influence third-party reimbursement policies in the following ways: by seeking to negotiate collective agreements with insurers; by agreeing to use coercive measures like proxy solicitation and group boycotts; and by actually making coercive threats to third party payers. The ALJ concluded that these practices unreasonably restrained competition, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and [2] ordered the society to refrain from engaging in coercive or threatening behavior directed toward health insurance reimbursement policies.

As explained more fully below, we affirm the ALJ's conclusions on liability and enter an order designed to prohibit future conspiratorial,

coercive activity by MSMS with respect to reimbursement policies and related issues. Our order, however, would not prohibit MSMS from providing information and views to private insurance companies, nor would it preclude respondent from participating in various state agency proceedings dealing with Medicaid issues, including reimbursement.

II. Respondent

MSMS, incorporated under the laws of Michigan, with its principal offices in East Lansing, is a professional association to which 80% of the physicians in Michigan belong. It is composed of 55 component medical societies, organized at the county level, and various specialty organizations. MSMS is itself a constituent society of the American Medical Association. MSMS' legislative unit, the House of Delegates, is composed of representatives from each of these component and specialty societies. For our purposes, it is sufficient to note that the powers and duties of the House of Delegates include the adoption of all rules governing MSMS' activities as well as the transaction of all business not specially delegated to committees. Elected from the House of Delegates is MSMS' executive body, the Council, which is authorized to act for the House in several ways relevant to this case. The Council executes the directives and resolutions of the House of Delegates between annual sessions of the larger body and monitors the work of House committees. (IDF 1–5)[1] [3]

III. Third-Party Payers

Because the third-party reimbursement system of purchasing health-care services lies at the heart of this matter, it is important to offer a description of its most salient features. Third-party payers are insurers of their subscribers' needs for health-care services. In exchange for payment of premiums, subscribers (in the case of private insurance) receive guarantees from the insurer to pay in full or partially for specifically covered medical services obtained by the subscriber during the term of the coverage. BCBSM is such a private third-party payer for health care services, providing hospital and medical care benefits to individual and group subscribers. Michigan

[1] Abbreviations used throughout this opinion are as follows:

ID–Initial Decision page number
IDF–Initial Decision finding number
CX–Complaint Counsel's exhibit number
RX–Respondent's exhibit number
RAB–Respondent's Appeal Brief page number
CAB–Complaint Counsel's Answering Brief page number
RRB–Respondent's Reply Brief page number
Tr.–Trial transcript page number
O.A. Tr.–Oral Argument transcript page number

Medicaid is a state-operated public assistance program that purchases health care services rendered to persons eligible for its form of insurance coverage.

Under BCBSM's "service-benefit" coverage, a "participating physician" is one who agrees to provide the services listed in a contract to subscribers, accepting the BCBSM payment in full and not charging the patient beyond that amount. A "non-participating" physician may participate for one time only ("per-case"), accepting BCBSM's scheduled reimbursement fee as payment in full. Alternatively, he may decline to participate in BCBSM insurance to any extent, in which case BCBSM reimburses its subscriber a fixed fee upon the physician's certification that he performed a service. The subscriber pays the physician's bill, which may exceed the benefit level paid by the insurer. Thus, a nonparticipating physician has no contractual obligation to BCBSM to accept the insurer's fee as payment in full for services rendered to a subscriber, and it is his option whether to accept BCBSM reimbursement as payment in full or to demand a higher payment from the subscriber. (IDF 126)

The number of physicians who contract to participate in a service benefit plan is a crucial element of the workability and attractiveness of the plan to potential and present subscribers. For one thing, by law BCBSM must have a minimum 50% of all Michigan doctors participating in order to offer service benefits at all. In BCBSM's view, though, the minimum threshold of physician participation required to assure satisfactory availability of services is 60%. (Hayes Tr. 360) According to the ALJ, "per case" participation does not adequately minimize costs and assure a subscriber of the availability of service benefits, so that only full participation will satisfy BCBSM's purposes. The ALJ also found that records and information generated by full participation facilitate BCBSM's cost-containment measures, which enhances its competitive position. (IDF 121) [4]

It is necessary to explain how BCBSM calculates the reimbursement paid to participating physicians in order to elucidate respondent's defense that it was attempting to influence only the manner of setting fees, rather than the actual levels of fees. BCBSM sets its reimbursement fees (which are described as "usual, customary and reasonable") for individual medical procedures and services by comparing three statistics: a physician's actual charge, the physician's "profile," and the "screen" for that service. The "profile" measures the individual physician's past charges for medical procedures and the "screen" compares the charges of other physicians in the relevant area. BCBSM determines a physician's profile from the claim forms submitted by him over the previous 12 months, whether or not he was fully participating. (IDF 130) Screens are employed to set a maximum

reasonable fee for a given procedure in a given area, based on physicians' actual charging patterns, and they are designed so that a certain percentage of the charges for a particular service (say, 80%) should be paid in full. (This assumes, of course, that physicians' actual charges for a particular service vary, which they do, with some above and some below what BCBSM determines to be its usual, customary and reasonable, or "UCR," fee for the service.)

Some of the acts challenged here arose in MSMS' attempt to compel BCBSM to calculate screens on a statewide basis instead of regionally.[2] As this introduction suggests, the question at hand is whether respondent's efforts to secure, among other things, the statewide screen, are correctly characterized as collective price-fixing and fee-tampering. To describe the character of the underlying events in coherent detail, it is first necessary to lay out MSMS' relationship with BCBSM and then turn to the chronology relating to Michigan Medicaid.

IV. Respondent's Relationship With Blue Cross and Blue Shield of Michigan

For thirty years prior to 1970, the board of directors of BCBSM was elected by the House of Delegates of MSMS. (IDF 109–110) While that control relationship was formally severed in 1970, liaison between the Council of MSMS and the management of BCBSM has continued uninterrupted, although differences in interests have arisen. In March 1974, the Council considered certain problems that physicians were having with insurance companies and governmental purchasers of medical services, problems that the Council determined to approach in a more aggressive way than it had theretofore. [5] Thus, in that year, the Council formed its "Negotiating Committee With Third Party Carriers," with Dr. Donald Crandall serving as chairman at all times relevant to this case.

A. *The Uniform Code and Claim Forms*

The first problems considered by the Negotiating Committee involved the quantity of paperwork required of participating physicians by insurance claim forms and the various procedural coding systems used by health insurers. At that time, MSMS strenuously preferred that all third-party payers adopt as a uniform code the American Medical Association's "Current Procedural Terminology" (CPT). Michigan Medicaid was apparently willing to use CPT if it became the single coding system for all Michigan health insurers. (CX 8L) But

[2] Prior to certain events described momentarily, BCBSM calculated four separate screens in Michigan based upon charging patterns corresponding to patterns of urban concentration.

BCBSM balked at this initiative, contending that conversion to the single code would be too costly ($1.1 million).

Believing that BCBSM was responding unreasonably, the Negotiating Committee requested that the House of Delegates unilaterally force the issue by officially adopting CPT as the only code to be used by physicians for all insurance forms. The Negotiating Committee also indicated that if these coding (and other) objectives could not be met by negotiation by the end of the year, it might recommend to the Council 1) statewide nonparticipation by members of MSMS or 2) unspecified legal action.[3]

In a closely related and contemporaneous sequence of events, the Negotiating Committee urged that a uniform claim form be used by all third-party payers. (*Id.*) In 1974, the Negotiating Committee preferred a form designed by the Michigan Department of Social Services and based on an AMA proposed claim form, but containing features tailored to Michigan insurance carriers and apparently containing sufficient information to permit insurers to process claims expeditiously. At one point, MSMS perceived that all third-party carriers were in accord with its proposal, with BCBSM and Michigan Medicaid both initially expressing their approval of the form. MSMS' optomistic expectations of industry-wide adoption of the form were not fulfilled, however. The greatest stumbling block was BCBSM's subsequent report that its claim-processing equipment could not accept the form. To condense this episode somewhat, MSMS' Negotiating Committee regarded this BCBSM reversal as unreasonable. It reported to the House that every effort to obtain BCBSM's input into development of a uniform claim form had been spurned and [6] that BCBSM had no intention of cooperating in that project, presumably because BCBSM hoped to force the continued use of its own form. (CX 8N)

MSMS purportedly favored no particular claim form—rather, its goal was merely to achieve uniformity. On its part, BCBSM agreed in principle to reduce physicians' administrative burdens by cooperating in the use of a uniform form, but believed that the form proposed by MSMS would entail excessively costly conversion of its data processing system. (IDF 141; Hayes Tr. 386)

Reaching this additional impasse, the Negotiating Committee proposed to the Council the same action as it did with respect to the single coding system described above. Nevertheless, in 1975, MSMS and BCBSM reached agreement on a uniform claim form (IDF 153). Thus, these particular events remain relevant to this proceeding only

[3] The Committee also recommended, it should be noted, that the House instruct its Committee on State Legislation and Regulation to (1) petition the office of the Insurance Commissioner and/or (2) seek legislation, to mandate the use of CPT in Michigan.

to illustrate the year and the context in which MSMS first suggested an organized withdrawal from participation in BCBSM. Even though these claim form disputes were settled, the screens and profiles provided further points of friction between MSMS and BCBSM and gave rise to the conduct at issue in this case.

B. *Regional Screens*

In October 1974, the Negotiating Committee asked BCBSM to abolish differences among the screens for the four geographical regions of Michigan.[4] Screens in the Detroit area were significantly higher than elsewhere, but MSMS contended that this differential was out of date, since the costs of practicing medicine had been equalized throughout the state as specialization had permeated Michigan. In respondent's view, these outdated differences in reimbursement levels created dissension among physicians and maldistribution of medical resources. (IDF 159; Crandall Tr. 1692)

The Detroit area (Area 1) accounted for 69% of BCBSM's total reimbursement payout of $300 million/year, with the other areas accounting for 22%, 8% and 1%. BCBSM believed that if it abolished regional screens but did not increase its total payout level (*i.e.,* did not abandon its cost-containment targets) it would have to reduce payments to Area 1 physicians by $14.5 million. BCBSM feared that such a reduction in reimbursement would make participation less attractive to a substantial number of providers in that region. To raise all other area screens to Area 1 levels, on the other hand, would cost an extra $7 million/year. (IDF 144) BCBSM believed that such an increase would be unacceptable to its subscribers and to the Michigan Insurance Bureau. [7]

Dr. Crandall, on behalf of the Negotiating Committee, suggested that BCBSM design a method of eliminating the regions without raising its statewide payout. (Crandall Tr. 1692) In his view, BCBSM could do this over a period of only one or two years without affecting participation by MSMS members in any region. (*Id.*) Before it would attempt such a design, BCBSM requested from MSMS a prediction of the likely effect of any reduction in Area 1 payout levels on MSMS members there. Apparently this overture came to naught—MSMS claims that it never received a specific proposal from BCBSM on which to survey its Area 1 members. (CX 8N) BCBSM eventually told MSMS that it could not eliminate regional differences in screens at that time, but that it might reconsider if MSMS could guarantee that

[4] Region 1 was the Detroit Metropolitan area; Region 2 included all counties in Michigan in which there was a city with a population in excess of 50,000; Region 3 included all other counties in the Lower Peninsula; and Region 4 contained all other counties in the Upper Peninsula. Regions 3 and 4 were combined as the screens in the Upper Peninsula came more in line with those of the Lower Peninsula.

a statewide screen would result in no loss in physician participation in Area 1. (CX 462Z 36)

C. *Updating of Physician Profiles*

Another bone of contention between BCBSM and MSMS was the manner in which the insurer kept its profiles, or physicians' billing histories. BCBSM customarily revised its profiles only upon the request of physicians, and only one third of the physicians filed such requests each year. In 1974, MSMS requested that BCBSM automatically update the profiles of participating doctors. (CX 8N) BCBSM responded that it could not annually update profiles and still stay within its cost-containment program, estimating that such an initiative would add $13 million to its reimbursement payout each year. (IDF 147) The Negotiating Committee then asked BCBSM just to send physicians their profiles annually without their having to request them, so that they would be able to update them themselves. BCBSM first indicated that it would do so, according to MSMS documents, but then refused because that change would involve additional administrative costs and because the annual mailing would amount to an invitation to request updating, which BCBSM did not want to precipitate. This response angered the Negotiating Committee because it seemed to lay upon physicians the burden of insuring that their profiles were accurate, even though BCBSM possessed the data necessary to do so. Furthermore, because of the lag in revising profiles, BCBSM at times informed subscribers that their physicians were "overcharging them" when in fact the physicians' customary fees had long since risen. (CX 8–O; Crandall Tr. 1696)

D. *Authorization To Seek Proxies*

Becoming frustrated in its negotiations with BCBSM on these issues, MSMS authorized its first proxy solicitation. Reacting to what it perceived to be

> the recalcitrant attitude of Blue Shield on the subjects of regionalization of fees and physician profiles, coupled with what [8] appears to be a total lack of willingness to cooperate with MSMS in the development of a uniform claim form or even consider the use of the CPT procedural code, (CX 8–O)

the Negotiating Committee recommended that the House of Delegates urge MSMS members to write letters to BCBSM withdrawing from participation but mail them to the Negotiating Committee to be held as "proxies." The House of Delegates authorized the committee to collect the proxies, but to use them only at the discretion of the Council, with prior notice to the members who submitted them, "if a

negotiating impasse develops with Michigan Blue Cross/Blue Shield." (*Id.*)

Although it secured the authority to collect such "departicipation proxies" in May 1975, the committee did not go forward and collect them then because negotiations with BCBSM began to go more smoothly. (IDF 151) As noted earlier, the claim form issues were resolved in 1975. Furthermore, BCBSM began to engage its directors in the talks instead of management personnel, an escalation that MSMS' Negotiating Committee attributed to the members' show of support for the proxy initiative. (IDF 152)

E. *The Proxy Solicitation*

In 1976, in conjunction with the creation of an expanded negotiations "division," the House of Delegates decided to obtain blanket authority to negotiate on behalf of all MSMS members.[5] (IDF 168–70) In so doing, the House of Delegates resolved to collect departicipation proxies, for the purpose of negotiating with third party payers over the manner of determining reimbursement amounts, but not over specific fees. (IDF 175) While the MSMS House understood, on advice of counsel, that it would run antitrust risks if it negotiated specific fees, it felt safe in negotiating, on behalf of members, the means by which reimbursement fees were determined. (CX 13Z 13) **[9]**

The first time that MSMS actually used this authority and collected such proxies was in a dispute that soon arose over a BCBSM proposal to change the manner of reimbursing hospital-based pathologists and radiologists. Believing that the proposed reimbursement plan for hospital-based physicians interfered with contractual relations between physicians and their hospital employers, (RAB 54) the Negotiating Committee moved to solicit departicipation proxies not only from the affected specialty groups but from all MSMS members. (IDF 178–80)

Each member of MSMS was urged by letter to resist "so-called cost-containment programs that in effect reduce reimbursement to physicians or place the responsibility for the reduction of costs solely on the practicing physician." (CX 2C; 472C) The letter, from the Council chairman, referred pointedly to the fact that a threshold percentage of physicians must formally participate in order for BCBSM to operate under its enabling legislation. It enclosed two blank "powers of attorney," one for BCBSM and one for Medicaid, empowering the Negotiating Committee to cancel the signer's participation in either

[5] The new division's intended purposes were to (1) identify specific problems amenable to negotiations, (2) assemble relevant data, (3) establish guidelines, (4) devise specific plans of action, (5) coordinate all negotiating activities of MSMS, (6) assist physicians who request negotiating aid, (7) educate members about negotiation, (8) obtain authorization from all members to be the exclusive bargaining agent for all, (9) collect proxies, and (10) formulate a negotiated participation agreement with third party payers which would eliminate reasons for nonparticipation. (IDF 168)

program if such action was deemed warranted by the Council. These powers of attorney were revocable at any time. While promising to give ten days notice before actually using the proxies, the letter indicated that the Negotiating Committee's tactical strength was enhanced merely by holding them. (CX 2C) MSMS leaders actively campaigned for the solicitation and, ultimately, a majority of MSMS members sent in executed proxies. (IDF 190)

As a result of this response, the dispute over radiologists' and pathologists' reimbursement was resolved in MSMS' favor with the *status quo* being preserved and BCBSM withdrawing its proposal.[6] (CX 653A–B; 10N–Q) As explained below, these proxies also played a role in MSMS' dealings with Medicaid. **[10]**

F. *The Second Departicipation Drive*

In 1977, three new reimbursement programs that were initiated simultaneously by BCBSM precipitated further collective departicipation efforts by respondent. In the first such program, BCBSM initiated several major changes in its reimbursement policies, some of which were responsive to positions taken by MSMS, but they applied only to physicians who formally participated in BCBSM's service-benefit plan. In an explicit effort to encourage formal participation, BCBSM increased overall reimbursement, implemented a statewide screen and updated profiles, all for participating physicians only.[7] (Hayes Tr. 700)

These 1977 reimbursement changes were prompted by BCBSM's concern over an increased rate of utilization of medical services in conjunction with a decline in "effective service benefits."[8] In BCBSM's view, corrective action was needed to increase the degree of full participation, and all of BCBSM's changes were intended to increase those incentives.[9] Switching to the statewide screen apparently resulted in an increase in total payout (Hayes Tr. 781), but it was BCBSM's view that increasing the level of participation would nonetheless facilitate cost-containment. (IDF 196)

In the second controversial program, BCBSM introduced a new cost-containment policy called Target Limitation on Expenditures ("TLE"), which set a statewide ceiling on total reimbursement for types of services, rather than setting specific fees for services. As

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[6] During this radiology/pathology dispute, BCBSM invited the Michigan Society of Pathologists to submit cost-containment ideas regarding laboratory and x-ray testing services. The two sides finally agreed on a cost-containment plan relating to hospital-based physicians. (IDF 181)

[7] These new policies were not designed to interfere with or eliminate other BCBSM reimbursement mechanisms which would have continued to increase reimbursement for all nonparticipating physicians through the usual adjustments to profiles and increases in area screens. (IDF 198)

[8] The term "effective services benefits" refers to the percentage of all claims for which physicians accept BCBSM payments in full, with no out-of-pocket payments by subscribers. In 1977, BCBSM believed that its effective service benefit level was too low.

[9] In April 1977, only 58% of Michigan's doctors formally participated. (IDF 202)

claims came in, BCBSM would adjust payments upward or downward to hit the expenditure target for each type of service for a given period. (IDF 203) [11]

The third reimbursement program arose from the UAW's collective bargaining process where, with no input from BCBSM, the union negotiated with the auto makers a package of hearing and vision benefits which were purchased from BCBSM. Unlike other service-benefit plans, the vision care plan paid non-participating physicians only 75% of the amount paid to participating physicians, with no per-case participation allowed, and the hearing care package paid nothing to non-participating physicians. (IDF 208) This "discrimination" in favor of participation was purposeful, due to the UAW's belief that the increased level of participation likely to result from the differentials would yield better costs and quality outcomes. (IDF 210)

MSMS opposed the new BCBSM reimbursement policies and the UAW vision and hearing care packages precisely because they discriminated against nonparticipating physicians, creating incentives for patients to switch physicians and thereby interfering with physician-patient relationships. Respondent also opposed the TLE program on grounds that it ignored the quality of care and would lead to an outflow of physicians from Michigan. Accordingly, MSMS officially "rejected" these new BCBSM policies, and called a special meeting of the House of Delegates to consider additional responses. (CX 355; CX 182F; IDF 212)

At that meeting, the Negotiating Committee recommended that all MSMS members react to these new reimbursement policies by writing letters to BCBSM (rather than submitting powers of attorney), withdrawing from participation or reaffirming their nonparticipation. Dr. Crandall rallied all members to support this collective withdrawal campaign, and the president of MSMS urged members that they must be "unified in the decisions that are reached today."[10] (IDF 218) [12]

As with the proxy solicitation, the MSMS leadership and members attending the special meeting were clearly aware that their proposed departicipation campaign bore antitrust implications. In a presentation on the proposal, MSMS' legal counsel advised that the House of Delegates was not, by the proposed action, authorizing the Negotiating Committee to fix prices, but only to argue persuasively with third-party payers. (CX 15Z 49) Counsel did advise, however, that the nonparticipation campaign would probably be regarded as a boycott and

[10] Literature that MSMS prepared for members to distribute to patients on the 1977 BCBSM reimbursement policies stressed the adverse effect of the changes on patients themselves, notably by interfering with the physician-patient relationship or by rationing medical services (through TLE). (CX 371C) Even so, the evidence leaves little doubt that the members of MSMS—especially the Delegates attending the special meeting—were aware or were made aware that the new BCBSM reimbursement policies might have a financial impact on them. (CX 15E)

would elicit some sort of legal action.[11] (CX 15Z 47)

The House then adopted the resolution urging individual physicians to withdraw from participation in BCBSM. At the same time, the Negotiating Committee recommended that if BCBSM persisted in its discriminatory programs after the receipt of the anticipated number of withdrawal letters, the House of Delegates should instruct physicians not to fill out BCBSM claim forms.[12] (CX 15Z 1)

MSMS leaders wrote to every House delegate and alternate and to every component and specialty society president urging them to departicipate and to encourage all members to do likewise. Members were advised of the campaign through MSMS publications instructing them to send letters to Dr. Hayes of BCBSM. (CX 95) They were also sent postcards on which they could indicate their decision to departicipate. (IDF 221) Members of local medical societies were urged through publications to spread the word, distribute form letters for departicipation, and solicit executed letters. (CX 260B; IDF 222-26) One county society indicated its intention to note the names of those members who did not intend to send departicipation letters so that it could compile call lists for follow-up telephone campaigning. (IDF 222; CX 261B) Another county society wrote its members recommending that they departicipate and that they not only drop their personal insurance with BCBSM but encourage their patients to do so as well. (CX 328; IDF 223) MSMS also publicly urged all Michigan employers to drop BCBSM and seek their doctors' advice in selecting alternative health insurance carriers. (Crandall Tr. 1724) [13]

Although the call to arms was not as widely heeded as MSMS desired, between November 1977 and June 1978, 410 physicians cancelled their participation agreements and 980 non-participating doctors reaffirmed their non-participation. (IDF 227) Many of the letters to BCBSM were identical, resembling form letters (CX 481–501), and mentioning MSMS. (IDF 227) During the departicipation campaign, results of a survey published in *Michigan Medicine* indicated that, of those sampled who had ever participated in Blue Cross plans (at any time, not just during the relevant period), 21% had quit at the urging of MSMS.[13]

Despite this departicipation campaign, BCBSM's new reimbursement incentives for participating physicians proved much more at-

[11] MSMS' counsel also described several theories of action, including antitrust, on which MSMS itself might sue BCBSM. (CX 15Z 4–9) In fact, MSMS filed an *amicus curiae* brief in the Supreme Court in *Group Life and Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), because the case involved "the extent to which Blue Cross-Blue Shield organizations may fix prices and discriminate against non-participating professionals free of antitrust liability." (IDF 59)

[12] MSMS denies that the Council or House of Delegates ever gave such authority or endorsed such a recommendation. (RAB 47) While the House of Delegates apparently never came to a decision or action on the question, such a recommendation was made by two MSMS committees to the House.

[13] And 42% had quit because they were dissatisfied with the level of reimbursement. (CX 124C)

tractive, bringing in a net gain of 962 formal participants and raising the participation level to 62% in April 1978. (IDF 232) During the campaign, Dr. Hayes of BCBSM received daily reports on the participation losses, as well as the gains from the new reimbursement program. While BCBSM was not concerned about the departicipation drive to the extent that gains were running ahead of losses, it was nevertheless unhappy to be losing hundreds of previously participating physicians. There was also testimony that the participation level of Michigan ophthalmologists in the UAW vision-care plan was so low (38%) that the plan would have failed if optometrists had not been included as alternative providers. (IDF 228) On balance, however, BCBSM decided to take no action in response to the departicipation campaign. (Hayes Tr. 438)

This is not to say, though, that MSMS' collective action and threats had no effect on BCBSM's reimbursement policies. Even during the waging of this departicipation campaign, MSMS and BCBSM had continued to negotiate over a statewide screen for non-participating physicians. We noted earlier that during this dispute the MSMS Council also initiated action to have members stop filling out claim forms. In that vein, a committee of MSMS suggested that instead of ceasing to submit claims altogether, which would result in hardship to patients, members should fill in only barely minimal data, which should have the desired effect on BCBSM. This committee was correct, for BCBSM believed that a refusal to fill out claim forms would be far more disruptive than the implications of the departicipation effort, because the former tactic would surely increase both administrative costs and delays in payment of claims, thus affecting BCBSM's competitive position. (Hayes Tr. 452, 441) Consequently, in May 1978, BCBSM implemented a statewide screen for all physicians. (IDF 246) In exchange, MSMS agreed to cease all of its collective action regarding both departicipation and the proposed refusal to complete claim forms. (IDF 242) [14]

Having completed our chronology of MSMS' action with regard to BCBSM, we must now step back and describe the events that were taking place with respect to Medicaid during the same period. We will then judge both courses of conduct together.

V. Respondent's Relationship With Michigan Medicaid

A. *Medicaid*

Under the Medicaid program, established pursuant to 42 U.S.C. 1396 *et seq.* (1976), health care providers are reimbursed from combined federal, state and local funds, paid and administered by the

states, for services rendered to low-income Medicaid recipients. Physicians who agree to treat Medicaid recipients agree to accept the Medicaid reimbursement as full payment,[14] and the amount of reimbursement is determined by mechanisms similar to those used by BCBSM. Michigan's Medicaid program is administered by the Michigan Department of Social Services ("DSS"), which makes direct payments to physicians and other providers for covered services rendered to eligible persons. (IDF 136)

B. *The Medicaid Liaison Committee*

The Medicaid Liaison Committee ("MLC") of MSMS is the formal successor to an earlier task force established by the Michigan government to deal with a broad array of issues growing out of the Medicaid program. Membership on the committee is divided between representatives of the state government and MSMS. The Michigan agencies participating in the committee include the various state departments concerned with health affairs as well as the units responsible for the budget. With this governmental component, the MLC is rather unique among the units of MSMS; nonetheless, it is constituted as an extension of respondent's House of Delegates. The MSMS representatives on the committee report directly to the House; they are authorized to act on MSMS' behalf regarding Medicaid matters and even to commit MSMS resources to the Medicaid program. (Siegel Tr. 1795–99)

C. *Per-Case Participation*

In 1976, MSMS came to believe that the Michigan DSS had breached a previous understanding about the terms on which physicians participated in the Medicaid program. In 1972, the representatives of MSMS had agreed with the state that its members would participate on a "per-case" basis. As later events disclosed, the DSS had interpreted that commitment as "per-person" participation, meaning that once a **[15]** physician had begun to treat a patient for one disorder, he would continue to do so for subsequent needs. The physicians, on the other hand, apparently understood their commitment as "per-service" only, with no continuing obligation to the patient. This misunderstanding caused friction when, in 1976, the DSS announced that physicians would not be permitted per-case participation and should not enter private-pay arrangements with Medicaid recipients.

In response to this DSS policy, the MLC recommended—and the MSMS Council adopted—a resolution declaring that physicians may

[14] This relationship between individual physicians and the Medicaid program is defined by both federal and state laws.

participate in Medicaid on a per-case basis or enter private fee arrangements with Medicaid-eligible patients. In doing so, the MLC obtained the approval of the House for members to "noncomply with the State's insistence that all Medicaid services must be charged to the State." (CX 425) A resolution was prepared advising members to provide only emergency services for Medicaid patients until the DSS permitted per-case participation on MSMS' terms. (CX 422C; CX 421A) The MLC defied the state to take legal action against any physician for failing to comply with the Medicaid policy. The state took no such action. (CX 10Z 6)

D. *The Proposed Budget Reduction And The MSMS Resolution*

The record shows that, despite their differences, the overall relationship between MSMS' Medicaid Liaison Committee and Medicaid was not wholly acrimonious. During 1975, for example, the MLC and the Michigan Departments of Social Services and Public Health conferred on various subjects, reaching agreement on such items as a code for neonatal and intensive care service, more adequate reimbursement for certain procedures and payment for consultant services in certain situations. (CX 8K) MSMS consulted continuously with representatives of the governor and legislature of Michigan on ways to contain rising Medicaid costs. (CX 426C) To paraphrase the director of the DSS, the state and the MLC have discussed cost-containment every year, since the state is always short of funds. (Dempsey Tr. 1755)

The year 1975 was no exception to the recurring shortage of public funds, and in December the governor's budget proposal called for significant reductions in many programs, including Medicaid. By MSMS' own rather detailed account, the governor issued an executive order affecting every facet of state government. Medicaid spending was to be cut by $22 million, $4 million of which was taken from the $96 million [**16**] originally budgeted for physician reimbursement.[15] According to the MLC, the effect of this reduction would be "an across-the-board discounting of all practitioners' billings by 11 percent, beginning January 1, 1976, and continuing through June 30, 1976." (CX 416)

The MLC had been aware of a possible reduction in Medicaid expenditures and had met with staff and members of state legislative appropriations committees, offering suggestions for cost reductions. But the MLC had cautioned the legislature against "across-the-board discounting," saying that such reductions in reimbursement would inhibit physicians from accepting new Medicaid patients. When the

[15] Other line items were reportedly cut from Medicaid including $6.7 million in hospital services and all of the appropriation for certain kinds of care for recipients over 21 years old. (CX 146)

reimbursement reduction was proposed despite this admonition, MSMS responded by formally adopting a policy resolution that it would *no longer encourage* its members to participate in the Medicaid program. (CX 416; IDF 249)

In adopting this official policy, the MSMS complained of

> the increased harassment on the part of the state and the obvious inequity of expecting us to subsidize the program by accepting a fee reduction. (CX 10 Z 5)

Following the passage of the Medicaid resolution, according to MLC Chairman Siegel's report to the House,

> the results were predictable. The number of participating physicians dropped dramatically, forcing patients into emergency rooms and Medicaid mills and dramatically increasing the cost of the program. (*Id.*)

The governor responded to MSMS' resolution and demand for restoration of the cut by calling a meeting of all providers of Medicaid-reimbursed services, including the hospital association, MSMS and the osteopathic association. Also attending were representatives of the state budget office, DSS and the legislature. They met to discuss the broader cost-containment plan of which the physician reimbursement reduction was a part. Dr. Siegel, as head of the MLC, was apparently well known in these circles by this time. By his own account of this meeting, he warned that if the 11% cut was not restored the state might be able to save the full appropriation for private physician participation in Medicaid. [17]

MSMS had collected the aforementioned powers of attorney for withdrawal from Medicaid by this time, but the record on the role they played in the meeting is ambiguous.[16] In the printed version of Dr. Siegel's report to the House of Delegates, the following passage that had appeared in Dr. Siegel's prepared remarks (or a draft thereof) was deleted:

> At one particular meeting I told the Governor that if the State continued its irresponsible methods, he could save the entire budgetary allocation for the Medicaid program as without physician participation there would be no program. *To emphasize my point, I waved our proxies at him.* (CX 413B-C) (emphasis added)

In prepared remarks to a negotiations seminar of the AMA in April 1977, Dr. Crandall also alluded to *"MSMS waving the proxies in the face of the legislature."*[17] (CX 411F)

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[16] The ALJ found that Dr. Siegel at least told the House of Delegates that he waved the proxies in front of the governor. (IDF 254)

[17] Furthermore, in a reference to the suggestion of the Michigan attorney general that he might bring antitrust action against the medical society for threatening Medicaid, Dr. Crandall said,

(footnote cont'd)

Dr. Siegel's version of this experience, given in testimony, is that he did not tell the governor about the proxies. (Tr. 1860) Nonetheless, he explained that his statement to the House— [18] implying that he did tell the governor—was premised on his certainty that the Michigan state officials knew of the proxies.[18] We find, therefore, a sufficient basis on which to conclude that Medicaid officials were well aware of the proxies at that time. There is also sufficient evidence that MSMS' purpose in this negotiation with the State of Michigan was to assure "adequate reimbursement."[19] [19]

The record contains various assessments of the effects of this collective action. Dr. Siegel reported to the House of Delegates that the consequence of MSMS' threatened withdrawal was the state's raising all physician reimbursement to current Medicare screens. He boasted that Michigan was the only state to do so (*i.e.,* Michigan doctors were the only ones to "accomplish this feat.") (CX 11Y) He also reported that after the adoption of MSMS' Medicaid resolution, physician participation had fallen "markedly." (CX 88A) Other testimony, however, suggests that the MSMS resolution had no intimidating effect on Medicaid or other Michigan officials. The director of the DSS, for instance, testified that, while he recalled hearing about MSMS' proxy solicitation, he was never threatened with any proxies (Dempsey Tr. 1761), nor did he ever feel coerced or pressured by the MLC. (*Id.* 1776)

VI. Arguments Of The Parties

On appeal, respondent contends fundamentally that it has not fixed or tampered with physicians' fees and has not facilitated agreement among any of its members on their fees, since at no time have Michigan physicians charged uniform fees. All that respondent was attempting to do through any of the acts alleged in this complaint was

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If the lawsuit had been pursued, the *Attorney General would have orchestrated the demise of the entire Michigan Medicaid program as the majority of Michigan physicians would have withdrawn from the program individually.* But all parties agreed the lawsuit would not be pursued if MSMS agreed not to initiate the proxies at that time. This action clearly demonstrates the significant clout MSMS and the state's physicians have if they will work in unison. (CX 411F–G) (emphasis added)

[18] Dr. Siegel acknowledged that in his presentation to the House he was "dramatizing" what had happened. (Tr. 1862)

[19] Dr. Siegel's report to the House of Delegates makes this purpose—to increase by collective action the amount of reimbursement paid by Medicaid—quite clear:

> The year just past will be most remembered by the members of the [MLC] committee as dealing with one major issue - *adequate reimbursement.*
>
> We were not content to have the 11 percent discount reinstated only to [be] replaced by a four percent discount as this did not address the major issue of the disparity between Medicaid payments and those of third party carriers. For instance, full Medicaid payment averages 23% less than is currently paid by Medicare because we are still being paid by Medicaid on the basis of 1973 Medicare screens. The Department of Social Services, when pressed on this issue, rightfully blamed the legislature for its insufficient budget - we therefore directed our ire at the leaders of the house and senate appropriations committees and we now have reason to believe that the Medicaid payments will be raised to the current Medicare levels with the next budget for the fiscal year beginning in October. If we accomplish our goal of Medicaid payments equal to Medicare, I believe Michigan physicians have an obligation to re-open their doors to Medicaid patients. (CX 10Z6) (emphasis added)

to insure that BCBSM and Medicaid honor their commitments to pay physicians "fair value" for their services. (RRB 10) MSMS also argues that its recommendations to members were merely policy positions and that it did not speak for or bind any of its members as a group. It argues further that its responses to BCBSM's 1977 reimbursement changes were well justified, and that in any event its responses had no impact upon BCBSM. With respect to the statewide screen, MSMS urges that it was primarily concerned about the distribution of physicians throughout the state. Respondent insists that it never requested that a statewide screen be set at the highest regional reimbursement level and that it never wanted to increase BCBSM's total statewide payout. (RAB 35) Furthermore, it had no idea whether a statewide screen would result in an increase in overall payout, so it denies any intent to raise fees. As for its Medicaid actions, these were a legitimate part of the budget process, according to MSMS. As this summary suggests, most of respondent's arguments go to the characterization of its acts. In order to articulate our legal assessment of the previously described course of conduct, it is instructive to give MSMS' interpretations a full airing. **[20]**

Complaint counsel argue that MSMS has engaged in concerted action with the purpose and effect of affecting—in fact, increasing—fees paid to its own members and has engaged in activity in the nature of a group boycott in order to achieve that purpose, all in violation of well-established principles of antitrust law dealing with price fixing. To MSMS' contention that it did not seek an increase in statewide payout, complaint counsel respond that those particular intentions should not be considered in a case charging collective action to influence fees or prices. (CAB 29 n. 2)

As to the collective nature of its efforts, MSMS insists that its departicipation letter drive was merely a policy of the society that members were free to follow or not, and not a collective or conspiratorial commitment to withhold or withdraw services from BCBSM. Respondent points out that even within its House of Delegates, which passed the resolution in question, only 16 of those 130 participating in BCBSM at the time submitted departicipation letters.[20] (RAB 47)

MSMS claims further that no damage to BCBSM's ability to offer service benefits resulted from its resolution. (*Id.*) More specifically, respondent attempts to show that its members' change from participating to nonparticipating status had no effect upon BCBSM, so that it cannot have frustrated any competitive or cost-saving innova-

[20] There were 384 Delegates, 112 of whom sent in letters withdrawing from participation or reaffirming their nonparticipation. Of the 130 Delegates who were formally participating physicians, only 16 were among the 112. (RAB 47)

tions by the insurer, as charged. MSMS' argument seems to be that formal participation is not essential to BCBSM's success, since a subscriber still receives a service benefit if treated by a nonparticipating physician, unless he or she consents to pay more. (RRB 7)

As mentioned earlier, respondent claims to have opposed BCBSM's 1977 reimbursement policies and the UAW's vision-care and hearing-care programs because they discriminated against a group of physician-providers and interfered with or influenced physician/patient relationships, in violation of BCBSM's enabling legislation. (RAB 40) MSMS was also incensed by BCBSM's representation that the 1977 reimbursement policies had been developed in consultation with MSMS. (RAB 44) [21]

As for the threat to have members stop filling out BCBSM claim forms, respondent protests that even though it obtained the authority to recommend such action, it never made the recommendation. (RAB 47; RRB 13) Admitting that it did obtain the authority, however, MSMS also points out that it never intended to harm patients, since it made no suggestion that its members stop filling in information that was minimally necessary to permit payment of claims. (RRB 13)

As for its Medicaid negotiations, MSMS explains that during preliminary stages of the legislative budget process, when input from MSMS and the MLC was routinely sought, Dr. Siegel discussed with state officials whether the legislature should reduce Medicaid payments or whether it should fund Medicaid according to the Medicare formula. Dr. Siegel gave his opinion, as MSMS' representative, that the Medicare formula would increase the quality of Medicaid care and actually reduce the costs of the program by neutralizing the "Medicaid mills." Dr. Siegel expressed opposition to the proposed 11% reimbursement reduction because he thought that the state should attack the Medicaid abusers directly instead of "punishing" all physicians. (RAB 11)

MSMS asserts that, in adopting its Medicaid participation resolution, it was only expressing a "policy." Complaint counsel contend, however, that the purpose and effect of the resolution was more than simply to enunciate policy, since the resolution was announced with fanfare and press coverage and referred to previous provider protests against Medicaid. Complaint counsel believe that the resolution was intended to encourage withdrawal as a means of coercing Medicaid and budget authorities with respect to physician fee levels.

MSMS attempts to neutralize its solicitation of Medicaid powers of attorney by pointing to the absence of proof that any state officials were coerced or intimidated by this alleged boycott threat. Although Medicaid reimbursement was raised to Medicare levels in 1977 following the MSMS resolution, restoration of the budget cuts did not occur

soon enough after MSMS' actions to create a persuasive or sufficient inference of causality, according to respondent. (RAB 28) Complaint counsel, however, would infer that state authorities were coerced or threatened from the fact that the attorney general responded by proposing antitrust action, as well as from the state's written response to the action. (CAB 34 n. 4; CX 421) **[22]**

Respondent stresses that none of its acts, however characterized, are either unreasonable or unlawful because they have had no effect on competition, for several reasons. First, BCBSM dictates the terms of participation, which doctors can either take or leave, and MSMS is powerless to affect them.[21] (RRB 6) Second, MSMS contends repeatedly that its members' fees are not uniform and thus not fixed. Third, the doctors are not parties to BCBSM contracts with subscribers, so that they do not affect, through participation decisions, BCBSM's ability to offer service benefits. Rather, if a patient is treated by a nonparticipating physician, he still obtains his service benefit. Fourth, MSMS seems to reject as wholly impractical the idea that doctors would compete in innovative ways against BCBSM, taking the position that doctors should not become entrepreneurs in lieu of practicing their profession. Even further, claims MSMS, there is absolutely no record evidence of any reduction in the incentives of physicians to compete. (RRB 17)

Complaint counsel's theory on the effects, briefly recapped, is that MSMS' actions have all the earmarks of a combination or conspiracy to manipulate or affect prices, that the concerted refusal to deal was itself a separate combination as well as an instrumentality of the entire course of conduct, and that these concerted actions have produced anticompetitive effects. The most direct effect is that physicians have foregone their freedom and have ceased to compete among themselves over the terms on which they would deal with third-party payers, making it impossible for the third-party payers to compete against each other by testing their offerings in the market against other insurers. In a related vein, MSMS' boycott against BCBSM impeded that insurer's efforts to compete with other insurers by containing costs and providing full service benefits. Furthermore, MSMS' concerted efforts discouraged its members and other physicians from competing with each other in innovative ways, such as offering prepaid care alternatives to BCBSM. (CAB 36–38) We turn to an analysis of these issues after resolving a preliminary question of jurisdiction. **[23]**

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[21] Dr. Siegel testified that he perceived the proxy action as a means of counterbalancing the leverage of those who "always seem to be negotiating for the services of individual physicians . . . [b]e it Blue Cross - Blue Shield of Michigan or the UAW or the state government." (Tr. 1831)

VII. Jurisdiction

The jurisdictional question presented in this appeal is whether the Michigan State Medical Society, by virtue of its status as a nonprofit organization, is exempt from the coverage of the FTC Act. That question was answered in the negative in a recent case involving state and local medical societies. *American Medical Association, et al.,* 94 F.T.C. 701 (1979), *aff'd sub nom. American Medical Association v. Federal Trade Commission,* 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided court,* 102 S.Ct. 1744 (1982). ("AMA")

Section 5(a)(2) of the FTC Act extends the Commission's jurisdiction to "persons, partnerships, or corporations;" Section 4 defines "corporation" to include:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, *which is organized to carry on business for its own profit or that of its members.* (emphasis added)

In *AMA,* the Commission examined the activities of national, state and county medical societies and found at all levels that they were within its jurisdiction. 94 F.T.C. at 983. More specifically, the Commission found in that decision that it possesses jurisdiction over nonprofit organizations whose profit-related activities comprise a substantial part of their overall activities rather than being merely incidental to some noncommercial activity. In this case, the ALJ applied the same standard and found that MSMS is within the jurisdiction of the Commission. The subsequent affirmance of the *AMA* decision provides powerful support for us to reach the same conclusion in this case. **[24]**

Nevertheless, we have fully examined the specific facts of this case bearing upon the jurisdictional issue. Our ruling rests upon the ALJ's extensive findings with respect to respondent's activities conducted for the profit of its members. (IDF 41–82) We find them to provide convincing support for our holding that the Commission possesses the requisite statutory jurisdiction over MSMS.

To name but a few, MSMS' lobbying and litigation activity with respect to matters affecting physicians' pecuniary interests, its control of a malpractice insurance company, and its operation of a for-profit subsidiary are all pecuniary activities not merely incidental to noncommercial functions. Furthermore, in addition to its more altruistic and medically-oriented objectives, it is the purpose of MSMS to guard and foster its members' material interests. (ID 5) The MSMS

Constitution lists as one of its objectives the advocacy of fair remuneration for its members' services. (IDF 42) Thus, while MSMS is unquestionably a nonprofit organization, it is a nonprofit organization that devotes a substantial amount of its resources to activities that directly enhance the pecuniary interests of its members, who are independent competing entrepreneurs. *Cf. Arizona v. Maricopa County Medical Society, et al.,* 102 S.Ct. 2466, 2480 (1982).

As we observed in *AMA,* Congress clearly did not intend to bring all nonprofit corporations, regardless of their purposes and activities, within the Commission's jurisdiction. Neither, however, did Congress provide a "blanket exclusion" from FTC jurisdiction for all nonprofit corporations, since it recognized that certain corporations ostensibly organized not-for-profit, such as trade associations, may be vehicles through which a profit could be realized for themselves or their members. 94 F.T.C. at 984, *citing Community Blood Bank of the Kansas City Area, Inc. v. FTC,* 405 F.2d 1011, 1017 (8th Cir. 1969). It is also clear, certainly following *AMA,* that an organization may come within the coverage of Commission jurisdiction even though it only indirectly or partially promotes profit for its members. For those purposes, Section 4 of the FTC Act requires only that the activities of the corporation provide pecuniary benefits to its members, *Id.* at 985, and we find those requisites present in the case before us. **[25]**

VIII. Legal Discussion

This case presents several distinct issues concerning the legality of MSMS' actions vis-a-vis BCBSM and the Michigan Medicaid program. We first consider whether MSMS, with the support of at least some of its members, engaged in concerted activity in conducting the departicipation campaigns and organizing the other activities of the Division of Negotiations and the Medical Liaison Committee. Next, we determine whether the conduct of respondent was unreasonable, either under a *per se* theory or a rule-of-reason analysis. Finally, we consider whether MSMS' responses to proposed reductions in State Medicaid payments and other changes to that program were justifiable, both in terms of substantive antitrust standards and the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

A. *Conspiracy Allegations*

The threshold issue here is whether MSMS' importunings with BCBSM and the Medicaid program amounted to conspiratorial conduct of the kind alleged in the complaint or simply represented nonbinding expressions of views and policy, as argued by respondent.

(RAB 46) As discussed previously, the evidence quite clearly reveals that MSMS members, acting through their House of Delegates, agreed in 1976 to establish a Division of Negotiations for the purpose of working out differences with third party payers. That Division was specifically empowered, *inter alia*, to coordinate all negotiating activities of MSMS, collect "non-participation" proxies and obtain a negotiated participation agreement with third party payers that would obviate the need for physician non-participation. (IDF 168) It also was specifically contemplated by MSMS that the Division of Negotiations would obtain authorization of all members to serve as their "exclusive bargaining agent." (CX 411E) The debate in the House of Delegates clearly indicated that, although the Division would not negotiate specific fees, it would have authority to negotiate the manner by which fees or reimbursement levels would be established.[22] **[26]**

Thus, at the outset we find that the very creation of the Division of Negotiations reveals a collective purpose on the part of MSMS and its members to go beyond the point of giving advice to third party payers; in fact, it reveals a purpose to organize and empower a full-fledged representative to negotiate and resolve controversies surrounding physician profiles, screens and other similar matters.[23] There is, in fact, considerable additional evidence that the Negotiating Division not only had the authority to reach understandings with third party payers but also utilized that authority (acting as agent for its members) in soliciting, collecting and threatening to exercise physician departicipation proxies, as well as in other negotiations with third party payers.

Similarly, despite the participation of its governmental representatives, the MLC was authorized by the House of Delegates to act on behalf of MSMS and its members, as Dr. Siegel's testimony confirmed. At all times, it seems clear that the MLC spoke and acted with the consensus and authority of the respondent and its members.[24] **[27]**

More specifically, respondent's acts and practices can properly be characterized as both agreements among horizontal competitors to set the terms of sale of their services and agreements to force third

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[22] Accounts of the House of Delegates meeting reveal some concern among the membership about the antitrust implications of conferring this authority upon the Division. MSMS' leaders responded that, while the Society would risk antitrust liability if it negotiated specific fees, it would be permissible to negotiate, on behalf of members, the manner in which reimbursement fees were set. (CX 13Z 13)

[23] Even the authority of the original Negotiating Committee, formed in 1974 by MSMS to pursue a more aggressive approach toward third party payers, was broad enough to encompass the power to negotiate agreements relating to the manner of setting fees; and the Negotiating Committee was presumably acting at all times described above within the scope of its delegated authority. At the formation of this predecessor committee, legal counsel advised the Society and its committee to avoid any formal recommendations that could be interpreted as price-fixing. (CX 166D)

[24] Although an organization may be held liable for antitrust violations committed by agents acting only under the apparent authority of the principal, *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1943–44 (1982), the facts here are much stronger inasmuch as the authority conferred upon the MLC and the Negotiating Division was quite explicit.

party payers to accept those terms.[25] First, as noted, MSMS initiated action to create the Negotiating Division and to give it the authority to bargain. A majority of the representative members of MSMS supported that action, the result of which is that the Division spoke for the entire membership. Second, the MSMS membership approved the grant of authority to the MLC, allowing it to speak on their behalf, notwithstanding the governmental component of that committee. In addition, the majority of MSMS' members lent their approval and authority to the collection of proxies or powers of attorneys, even though the entire membership did not actually submit them. Still further, a substantial number of MSMS members actually submitted letters of departicipation to BCBSM, many of which were identical form letters with copies sent to MSMS.[26] In the departicipation campaign, MSMS set out to insure that the degree of cooperation among its members reached the requisite level for effective action. And, in actually submitting their powers of attorney, a majority of the members of MSMS effected an even more explicit designation of MSMS as their bargaining agent.

Thus, it should be apparent that, wholly apart from the threatening behavior of the boycott, there was concerted behavior in the formation of the agreement among competing members of MSMS to have the Negotiating Division and the MLC bargain on their behalf (or as their agents) over the terms on which they would perform their services. In this regard, [28] the record shows substantially that the Negotiating Division and the MLC carried this role well beyond the point of general advocacy. Indeed, MSMS entered into a formal agreement with BCBSM at a later stage of the negotiations. (IDF 242–43)

There is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws. In several cases, combinations have been found to exist by virtue of the group adoption of ethical codes of conduct. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978); *American Medical Association, et al.,* 94 F.T.C. 701 (1979), *aff'd sub nom. American Medical Association v. Federal Trade Commission,* 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided court,* 102 S.Ct. 1744 (1982).

Although the present case does not involve ethical codes or specific fees, there is no question about the collective nature of the actions

[25] While not all members of MSMS competed directly with one another, in view of the scope of the agreements, along with the putative and actual authority of MSMS to act on behalf of its members, it is not necessary to delineate precisely who competed with whom.

[26] Our findings here do not address the question whether each member of MSMS could be charged with having participated in the enumerated concerted courses of conduct, since that issue is not before us. It is sufficient to find that MSMS conspired with substantial numbers of willing or acquiescing members in the ways described, including ways that were putatively or actually binding on all.

under scrutiny; nor is there any doubt that these joint activities involved more than an attempt merely to influence third party payers through persuasion. In fact, the evidence shows that MSMS officials made repeated statements about the purpose of their activities and the success of these efforts. For example, the chairman of the Negotiating Division stated that

> The [Negotiating] division also was to obtain authorization from all MSMS members to serve as their "exclusive bargaining agent" . . . and to formulate and negotiate participation agreements with third party payers . . . . (CX 411E) (Dr. Crandall)

And, with respect to the proxies,

> The Negotiating Division was instrumental in combining the forces of the Michigan radiologists and pathologists in confronting this Blue Cross/Blue Shield recommendation and was subsequently successful in their efforts to maintain the present hospital-based reimbursement modalities. (CX 653B) (Report of the Division of Negotiations) [29]

In regard to Medicaid, the chairman of the MLC reported the following to the membership:

> Of great benefit to your Medicaid Liaison Committee in these dealings has been the willingness of practicing physicians to "back our play." (CX 88A)

If anything, the evidence of collective activity is even stronger here than it was in *Goldfarb,* where the state bar's role in promoting fee schedules was mainly limited to promulgating guidelines that were enforced by the county bar associations. *See American Medical Association, et al.,* 94 F.T.C. at 998.

Turning to the boycott issue, the law is clear that the definition of that term is not limited to situations where the target of the concerted refusal to deal is another competitor or potential competitor. As the Supreme Court indicated in *St. Paul Fire and Marine Ins. Co. v. Barry,* 438 U.S. 531 (1978), a concerted refusal to deal may be characterized as an unlawful group boycott where the target is a customer or supplier of the combining parties. *Accord, Gibson v. Federal Trade Commission,* 682 F.2d 554 (5th Cir. 1982) (illegal group boycott found where targets were suppliers). In the instant case, the alleged boycott involves concerted threats by MSMS and its members to refrain from participating in BCBSM and Medicaid unless the latter modified their reimbursement policies. Although BCBSM and Medicaid—the targets of the boycott—are not in competitive relationships with MSMS, that fact alone does not preclude a finding of a boycott.

Respondent, however, argues that the proxies were not exercised and, in the case of the departicipation letter campaign, that there was

no adverse effect on BCBSM. As to the latter contention, MSMS points out that more physicians signed up to participate in BCBSM during the relevant period than withdrew from the program as a result of the campaign. The success or failure of a group boycott or price-fixing agreement, however, is irrelevant to the question of either its existence or its legality. Whether or not the action succeeds, "[i]t is the concerted activity for a common purpose that constitutes the violation." *American Medical Association,* 638 F.2d at 450. Furthermore, an agreement among competitors affecting price does not have to be successful in order to be condemned.

> It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which §1 of the [Sherman] Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or [30] successful on the other. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 224 n. 59 (1940).

Moreover, even if less than all members of an organization or association agree to participate, that fact does not negate the presence of a conspiracy or combination as to those who do participate.[27]

As for the collection of proxies that were never exercised, the law does not require that a competitor actually refuse to deal before a boycott can be found or liability established. Rather, the threat to refuse to deal may suffice to constitute the offense. *Fashion Originators' Guild of America v. Federal Trade Commission,* 312 U.S. 457, 462 (1941); *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600 (1914). The evidence indicates that the threat implicit in the collection of departicipation proxies and the attendent publicity can be as effective as the actual execution of the threatened action. Indeed, it may be assumed that parties to a concerted refusal to deal hope that the announcement of the intended action will be sufficient to produce the desired response. That appears to be precisely what happened here, and there are contemporaneous testimonials by MSMS officials confirming the success of that strategy. For example, Dr. Crandall suggested that MSMS' "waving the proxies in the face of the legislature" persuaded the state attorney general that if he sued MSMS the state would have "orchestrated the demise of the entire Michigan Medicaid program." (CX 411F–G) Also, as noted above, the Negotiations Division credited the members' response to the proxy solicitation with the favorable outcome of the dispute between the radiologists and BCBSM. (CX 653A; CX 10Q) And, as further evidence, there is the fact that MSMS reached a formal

[27] In its recent decision in *Arizona v. Maricopa County Medical Society, et al.,* 102 S.Ct. 2466, 2469 (1982), for example, the Supreme Court based its finding of a conspiracy to fix prices on the majority vote of a medical society's members.

agreement with BCBSM which included the implementation of a statewide screen. (IDF 242)

In its defense, respondent claims that there were independent reasons—such as BCBSM's repentant correction of previous inequities—for BCBSM ultimately to adopt policies that coincided with the interests of MSMS and its members. (RAB 33) Whatever the significance of this argument for liability purposes, it does not affect the finding that respondent and its members combined and conspired to negotiate a satisfactory agreement with BCBSM and to back that action with measures designed to force BCBSM to modify its policies. **[31]** Since BCBSM is the target of the alleged conspiracy, not a participant, its reasons for taking the course that it did are of little probative weight as to whether MSMS and its members engaged in concerted activity.

To sum up this threshold discussion, we believe that the evidence unambiguously reveals that respondent, together with its members, sought to effect changes in the reimbursement policies of BCBSM and the state Medicaid program through collective negotiation of agreements with these third party payers, backed up by threats of physician departicipation if satisfactory agreements could not be worked out. We conclude, therefore, that these activities constitute an agreement among competitors to affect fees and that respondent's behavior in connection with the proxy campaigns amounted to a concerted refusal to deal or group boycott. Having found such a conspiracy, we now address its legality.

B. *Legality Of The Concerted Action*

Complaint counsel contend that MSMS' practices so closely resemble forms of conduct that have long been held *per se* illegal that the Commission should not hesitate to apply that standard. While the ALJ applied a rule of reason and still found MSMS' conduct unreasonable, the respondent argues that he applied that test in name only, ignoring certain exculpatory evidence. As noted earlier, respondent stresses that none of its acts are either unreasonable or unlawful because they have had no effect upon competition. (*See* p. 25, *supra.*)

The judicial principle of *per se* illegality was adopted by the courts to economize in the analysis of certain agreements or practices

> which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958). **[32]**

Whenever the *per se* rule is thought to apply, it is necessary as an initial step to determine whether the practices in question bear so

close a resemblance to practices that have been previously deemed *per se* illegal that further market analysis can be dispensed with. For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979), the Supreme Court declined to apply the *per se* rule to a novel "blanket licensing" arrangement, even though it literally required agreement among composers on the prices to be charged for use of their compositions. The composers had delegated to their organization the power to fix the price of works covered by the blanket license, but the arrangement did not in any way restrain the individual owners from selling their compositions separately at any price. In effect, the blanket license amounted to a separate product offering, quite different from anything that any individual owner could offer for sale. For those reasons, the Court found that the arrangement in *Broadcast Music* did not sufficiently resemble the price-fixing arrangements traditionally and categorically forbidden under the Sherman Act.

In recent decisions relating to collective conduct among professionals, the Supreme Court has had several occasions to determine the applicability of the *per se* standard to various restrictive practices. In *Goldfarb,* the Court applied the *per se* rule to a professional association that took part in a conspiracy to adhere to minimum-fee schedules. 421 U.S. at 782. In *Professional Engineers,* after discussing the scope of the rule of reason, the Court chose to apply a *per se* standard to a national organization's ethical guidelines that prohibited members from negotiating fees until after a customer had selected an engineer. Most recently, in *Maricopa,* the Court specifically applied the *per se* standard to an agreement among competing physicians and their medical societies as to the maximum fees that they would claim as reimbursement for services rendered to insured groups. The *Maricopa* Court found the anticompetitive arrangement in that case to be "fundamentally different" from that in *Broadcast Music.* 102 S.Ct. at 2479.[28] [33]

As illustrated above, the *per se* standard may apply even if conspiratorial behavior does not establish specific prices or fees. Only *Goldfarb* and *Maricopa* involved efforts to set uniform fees, and even in the latter case, the agreements were limited on their face to maximum fees. Outside the professional context, the Supreme Court recently struck down as *per se* illegal agreements among competitors to restrict credit offerings, a practice that affected only one aspect of the price charged to customers. *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980). This ruling stems from the venerable principle of

[28] Similarly, in our AMA decision, we held *per se* unreasonable ethical guidelines prohibiting the receipt of inadequate compensation by physicians because those provisions were so closely akin to the more traditional forms of price fixing. 94 F.T.C. at 1014.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), that the *per se* rule applies to agreements that affect prices even where an actual effect on prices is not shown.

> Any combination which tampers with price structures is engaged in an unlawful activity . . . . [T]o the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. . . . Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. *Socony-Vacuum,* 310 U.S. at 221, *quoted in Maricopa,* 102 S.Ct. at 2474.

In the instant case, it can hardly be denied that the practices in question bear a close resemblance to price-tampering combinations traditionally found to be unreasonable. For example, MSMS and its members collectively sought to negotiate changes in area screens, which are BCBSM's measures of maximum reasonable reimbursement for specific services in given geographic areas. Respondent also was involved in joint efforts to update physician profiles, a practice which could take account of legitimate cost increases but which could also lead to more rapid upward adjustment of price levels reflecting the enhanced market power of the combined market participants. And, MSMS' collective efforts to restore cuts in Medicaid payments to physicians have a fairly obvious relationship to fee levels under that program. Although MSMS contends that its purpose was only to affect the *manner* of setting fees, it is quite clear that at least a partial purpose and effect of respondent's actions was to increase both the reimbursement received by some physicians and the frequency with which the fee levels of many physicians were revised upward. As we discuss further, *infra* at 38, respondent's tampering with the means of setting prices is tantamount to tampering with reimbursement levels, even if specific fees or prices were not directly established. **[34]**

Thus, it would appear that respondent's conduct approaches the kind of behavior that previously has been classified as *per se* illegal. Nevertheless, since this conduct does not involve direct fee setting, we are not prepared to declare it *per se* illegal at this juncture and close the door on all asserted procompetitive justifications. We took a similar stance in our *AMA* decision with respect to several of the ethical restrictions at issue there, citing the Supreme Court's observation in *Professional Engineers* that the nature of competition in the professional services may differ from that found in other business activities. *American Medical Association, et al.,* 94 F.T.C. at 1003. Of course, in examining these proferred justifications under the rule of reason, our concern is with the competitive effects of the practices, not considerations unrelated to competition. *Professional Engineers,* 435 U.S. at 690. Moreover, as we noted in *AMA,* "the contours of the analysis

required under the rule of reason will vary somewhat depending upon the nature of the restraint." *American Medical Association, et al.*, 94 F.T.C. at 1004.[29]

To briefly recap, respondent has offered the following justifications for its behavior: (1) the practices had no effect on fee levels and, in any event, BCBSM and Medicaid took independent action to correct the perceived problems; (2) MSMS simply sought to insure that physicians were treated fairly, especially in view of BCBSM's bargaining power; (3) the actions were, in part, an effort to counter BCBSM's violations of its charter and Michigan law in connection with its modified participation program; and (4) MSMS was striving to correct abuses of the Medicaid system and the poor perpetrated by "Medicaid mills."

With respect to respondent's first contention, MSMS claims that the conduct never led to uniform fees or prevented individual physicians from deciding whether to participate in BCBSM or Medicaid. We believe that these arguments miss the point with respect to the likely competitive effects of the restrictive practices. Where horizontal arrangements so closely relate to prices or fees as they do here, a less elaborate analysis of competitive effects is required. *National Society of Professional Engineers,* 435 U.S. at 692. The collective actions under scrutiny clearly interfere with the rights of physicians to compete independently on the terms of insurance coverage offered by BCBSM and Medicaid. Moreover, the joint arrangements directly hamper the ability **[35]** of third party payers to compete freely for the patronage of individual physicians and other physician business entities. As the record indicates, the cost of any service benefit package offered by third party insurers is directly affected by the level of physician participation in the program. Thus, even though physicians are not formal parties to BCBSM contracts with subscribers, as respondent points out, physician response to service benefit terms can have a significant impact on the cost and competitive viability of the plan.

Although it is unnecessary to show a specific effect on fee levels, the potential for competitive harm is illustrated by the debate that followed MSMS' demand that BCBSM adopt a statewide screen. Respondent claims that it never intended to increase the total payout to physicians because increases in one region could be offset by decreases in another. Yet, that proposed solution simply underscores the dilemma facing BCBSM: it could either increase reimbursement to all

[29] For example, there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan. Thus, no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial. Moreover, given the kind of horizontal arrangements at stake here, there may be less need for detailed market delineations in any event.

physicians or reduce reimbursement to some physicians, a prospect that obviously makes it difficult for BCBSM to resist upward pressures on fees and reimbursement levels.[30]

MSMS also claims that BCBSM and Medicaid ultimately acknowledged the validity of its positions and took independent action to respond to those concerns. This justification is closely related to MSMS' contention that its actions were only designed to insure that member physicians were treated fairly, particularly in view of BCBSM's superior bargaining power. These arguments can be dealt with quite easily.

With respect to the reasons for actions ultimately taken by BCBSM and Medicaid, there is testimony by officials of both organizations suggesting that they were not coerced into making their decisions. Nevertheless, there is also clear contemporaneous evidence that MSMS' negotiations and boycott threats had an impact on the decisions of those entities, *e.g.* pp. 11, 16, *supra.* In this respect, it is particularly difficult to discount MSMS' own contemporaneous assessments of the success of its efforts, pp. 28–30, *supra.* **[36]**

On the question of whether the proposed policies of BCBSM and Medicaid were fair to physicians, respondent would apparently have us become enmeshed in weighing the comparative equities of the different parties to these transactions. In fact, considerable portions of the record are devoted to an assessment of the relative merits of MSMS' bargaining position. For us to consider whether the terms offered by the third party payers were fair or reasonable would lead us into the kind of regulatory posture that the courts have long rejected. *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397–98 (1927); *Maricopa,* 102 S.Ct. at 2473–74. It would be analogous to the Commission serving as a quasi-public utility agency concerned with balancing interests unrelated to antitrust concerns. We believe that it is undesirable and inappropriate for us to step in and attempt to determine which party had the better case in these dealings.

Respondent further attempts to justify at least some of its actions by alleging that BCBSM's institution of a statewide screen and other inducements, limited to participating doctors, violated state law. This assertion, however, is neither supported by documented evidence nor does it constitute a sufficient excuse for a group boycott. In *Fashion Originators' Guild,* the defendant sought to justify a concerted refusal to deal with firms that used pirated designs by showing that the

[30] We do not imply that all forms of negotiation, even those that may have some indirect effect on fees, between MSMS and third party payers are likely to produce anticompetitive consequences. For example, as complaint counsel acknowledged (O.A. Tr. 33), discussions between MSMS and BCBSM on the question of a uniform claim form may raise no antitrust concerns. On the other hand, resort to concerted refusals to deal on that or other subjects raises more serious problems. We have no occasion here to address the legality of non price-related collective behavior.

conduct engaged in by those firms was tortious under state law. The Supreme Court had little difficulty in rejecting this argument, observing that

> even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law. 312 U.S. at 468.

In most instances there are, and were in this case, alternatives to the collective extra-legal course taken, such as petitioning government authorities or seeking redress in the courts. Indeed, some of those alternatives were considered by the Negotiating Committee in discussing how to respond to BCBSM's reluctance to negotiate a uniform claim form. (CX 8M) Respondent also suggests that its activities were motivated by concern for the welfare of its members' patients, especially in the case of Medicaid where, it is alleged, reductions in reimbursement levels might lead to lower physician participation rates and force low-income patients to seek less reputable providers (the so-called Medicaid mills). **[37]**

In *AMA,* we acknowledged that regulation of deceptive advertising claims by physician organizations could be procompetitive inasmuch as such regulation would protect honest providers and facilitate informed consumer choice. *See also Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Friedman v. Rogers,* 440 U.S. 1 (1979). Nevertheless, we rejected a sweeping ban on advertising because the ban was overbroad, chilled legitimate provision of information and was not the only means of preventing deception. Similar arguments were advanced in that case to justify ethical guidelines prohibiting forms of compensation other than the traditional fee-for-service. For example, it had been argued that contract-based reimbursement "injects a type of commercialism into medical practice which is harmful to the public and the medical professions and results in inferior quality of medical service." *American Medical Association, et al.,* 94 F.T.C. at 1013. We concluded there that the relationship between such reimbursement mechanisms and health care quality was simply too tenuous, from a competitive perspective, to justify the broad restrictions imposed.

While we are not addressing ethical standards in this case, many of the quality and patient welfare arguments asserted here have a ring similar to those advanced in *AMA*. Even in the case of Medicaid reductions, where an argument might be made that arbitrary cuts could be counter-productive by impairing physicians' economic incentives to treat the poor, it is difficult to see how concerted agreements and refusals to deal can be sanctioned as a means of fighting proposed payment cutbacks. While granting MSMS' laudable concerns about

the effects of physician withdrawal from Medicaid, we observe that respondent clearly had public forums (protected under the *Noerr-Pennington* doctrine discussed *infra*) available to it to correct perceived mistakes made by the state legislature or the administrators of Medicaid; it could have expressed its views in ways that fell well short of organized boycott threats.

Finally, we find no suggestion among MSMS' justifications that the concerted behavior here enhanced competition in any market by injecting new elements or forms of competition, reducing entry barriers, or facilitating or broadening consumer choice. The price-related practices in question here are not ancillary to some broader procompetitive purpose, such as a joint venture, an integration of activities, or an offer of a new product or service as in *Broadcast Music.* **[38]** It was upon this basis that the Supreme Court found the price-fixing activities in *Maricopa* "fundamentally different" from the circumstances of *Broadcast Music.* The combination of competing physicians in the Maricopa foundation did not permit them to offer any different kind of product or service; it only fixed the maximum fees at which individual physicians would offer their services, permitting them potentially to affect the prevailing price of services and, thus, fitting "squarely into the horizontal price-fixing mold." 102 S.Ct. at 2480.

It might be argued that collective action would save administrative costs by better enabling physicians to bring to the attention of insurers the relevant cost factors justifying statewide screens, profile revisions and altered Medicaid reimbursement levels. But such an efficiency was deemed insufficient in *Maricopa* to justify the collective action necessary to achieve it. While admitting that it was less efficient for an insurer to deal with each physician individually, the Court would not condone an agreement or group boycott among physicians to determine acceptable reimbursement terms under an insurance plan. As in *Maricopa,* it is not clear here why insurers cannot obtain relevant cost data or other information from providers without the necessity for providers to engage in the kind of practices that occurred in this case. 102 S.Ct. at 2478, n. 28.

In fact, we believe there are less anticompetitive ways of providing such information to insurers. The order that we would impose upon respondent allows it to provide information and views to insurers on behalf of its members, so long as the Society does not attempt to extract agreements, through coercion or otherwise, from third party payers on reimbursement issues.[31] In allowing respondent to engage in non-binding, non-coercive discussions with health insurers, we

[31] Although considerable portions of this record were devoted to respondent's earlier argument that its collective actions were necessary to counterbalance the monopsony power of BCBSM, that position has apparently been abandoned on appeal, as complaint counsel observe. (CAB 44)

have attempted to strike a proper balance between the need for insurers to have efficient access to the views of large groups of providers and the need to prevent competitors from banding together in ways that involve the unreasonable exercise of collective market power. **[39]**

We also note that this case does not involve a situation in which industry-wide self-regulation is essential to the efficient functioning of the market, such as *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918), wherein the classic articulation of the rule of reason was set forth. Nor is the instant case analogous to the establishment of industry-wide product standards which may enhance competition by facilitating consumer choice. Of course, even in such circumstances, broadly overreaching restrictions will be struck down. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961); *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963). While there are certainly examples of industry self-regulation and collective restraints that are necessary to make a service or goods delivery system work effectively, this case is not of that character.

To sum up, we find that MSMS' participation in collective actions designed to pressure third party payers to accept changes in reimbursement policies involves a clear threat to competition, with offsetting benefits to competition that are either very weak or non-existent.[32] In our view, these practices unreasonably restrain trade and constitute violations of Section 5 of the FTC Act. As we discuss more fully below, in crafting a remedy for these violations, we intend to proscribe only collective activities that have a probable or foreseeable effect on prices or fees. Yet, even as to fee-related activities, we do not intend to preclude respondent from providing information to private insurers, nor do we limit the lawful rights of MSMS to petition governmental entities where fee-related issues are concerned.

C. *Noerr-Pennington Issues*

Before discussing the issue of relief, we must address respondent's *Noerr-Pennington* defense with respect to Medicaid. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). The ALJ rejected this defense on two grounds: first, because MSMS was dealing with Medicaid, **[40]** a governmental entity, in its capacity as a purchaser of services, respondent's reliance upon rulings protecting

[32] We note that collective efforts by providers to enter into agreements with third parties may be coercive even absent a direct threat of a boycott, since the bargaining process itself carries the implication of adverse consequences if a satisfactory agreement cannot be obtained. In this case, however, the negotiation process undertaken by MSMS was closely intertwined with the use of departicipation threats and other sanctions against third party payers.

political expression was misplaced; and, second, MSMS' threats removed its activities from the realm of protected communications. MSMS contends that the ALJ improperly distinguished political expression from economic activity, since a communicant is always promoting some economic interest. (RAB 14) It points out that some of its activities were aimed at Medicaid and the legislature—both government entities. Respondent relies heavily upon *Crown Central Petroleum v. Waldman,* 486 F.Supp. 769 (M.D. Pa.), *rev'd on other grounds,* 634 F.2d 127 (3d Cir. 1980), involving gas station closings aimed at influencing DOE to raise dealer margins, acts that were deemed to be exempt under *Noerr.* It also relies upon *In Re Airport Car Rental Litigation,* 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd* 1982–83 Trade Cases (CCH) ¶65,039 at 70,791 (9th Cir., November 16, 1982) [693 F.2d 84], in which activity was found to be exempt under *Noerr* even though the communicants were in a business relationship with the airport managers they sought to influence. (RAB 16)

Complaint counsel respond that MSMS' attempt to coerce Medicaid to raise reimbursement goes beyond the realm of influence protected by the *Noerr* immunity. They distinguish *Airport Car Rental* on grounds that the companies there only agreed to advocate a position that would injure their competitors, whereas here MSMS members are agreeing not to compete with each other and are dictating terms to Medicaid. (CAB 52) They also cite *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971), a Ninth Circuit decision holding that threats clearly lose whatever *Noerr* immunity noncoercive forms of communication may have enjoyed. (CAB 52)

The essence of the *Noerr-Pennington* doctrine is that individuals or corporations may band together, without fear of antitrust liability, for purposes of influencing government processes. In *Noerr,* the focal point of the petitioning activity was the legislature, whereas in *Pennington,* the Supreme Court sanctioned collective attempts to get executive branch agencies to take particular action. More recently, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Court extended the doctrine to include joint petitions seeking favorable decisions by judicial bodies. Although originally premised on an interpretation of the scope of the Sherman Act (*see Noerr,* 365 U.S. at 135), the Court in *California Motor Transport* made clear that the doctrine is also grounded in First Amendment principles. 404 U.S. at 510–511. The right to petition the government is protected even if the intent is to seek action that would [41] injure competitors. However, as the Supreme Court has explicitly stated, the *Noerr-Pennington* doctrine does not shield activities that are ostensibly designed to obtain favorable government responses but in reality are mere

shams to disguise anticompetitive behavior directed toward nongovernmental entities. *Noerr,* 365 U.S. at 144.

With this brief background, we turn to the issues presented here. The principal questions are (1) whether the activities of MSMS and its members exceed the bounds of legitimate political influence or lobbying activities, and (2) whether a different standard should apply to attempts to influence government officials involved in commercial activities.

As to the first question, it is argued that MSMS' efforts went beyond the simple joint expression of views to the State of Michigan, since the Society's members, through their representative, the MLC, sought to negotiate a satisfactory agreement with Medicaid regarding overall reimbursement levels and "per case" participation. As we have discussed previously, these negotiating efforts were backed up by the clear threat of withdrawal from the Medicaid program or, in the case of per-case participation, of refusal to handle anything other than emergency cases. In *Noerr,* the Court, in construing the scope of the Sherman Act, distinguished collective lobbying activities from the kind of joint practices typically condemned by the antitrust laws. The Court observed that efforts to persuade the legislature or executive to take particular action

> bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. 365 U.S. at 136.[33] [42]

The Court added that the Sherman Act did not apply to the activities under scrutiny, "at least insofar as those activities comprised *mere solicitation* of the governmental action with respect to the passage and enforcement of laws." *Id.* at 138 (emphasis added).

Thus, viewed from this perspective, the activities of MSMS and the MLC arguably fall beyond the borders of *Noerr-Pennington* in two respects. First, they amount to collective decisions to accept or reject the State Medicaid policies, not simply collaborative efforts to advocate a change in those policies. Second, the Society's actions involved threats of departicipation or restricted participation if disputes with Medicaid were not resolved. In effect, then, MSMS' activities went

[33] This distinction has been criticized for suggesting a rather artificial limitation on the reach of the Sherman Act as interpreted in other contexts. Fischel, *Antitrust Liability For Attempts To Influence Government Action: The Basis And Limits Of The Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 83 (1977). While there may be some validity to this observation—certainly collective attempts to "lobby" a supplier or customer, as distinct from the government, would be viewed with suspicion—efforts to influence legislators or other government decision-makers previously had not been characterized as an antitrust violation.

beyond the process of influencing legislative or administrative decisions and encompassed efforts that interfered directly with the competitive process, actions that are more closely analogous to the kind of anticompetitive agreements alluded to in *Noerr.*

The issue is complicated, however, by the emphasis in subsequent cases on the First Amendment basis for the *Noerr-Pennington* doctrine. More specifically, what modes of expression, other than oral or written advocacy, are protected by *Noerr-Pennington?* Respondent cites two cases, *Crown Central Petroleum* and *Missouri v. National Organization For Women,* 620 F.2d 1301 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980), for the proposition that even boycott-type activities are immune from antitrust liability. In *Crown Central Petroleum,* the district judge concluded that a coordinated shutdown by gas station operators to protest Department of Energy ceiling price policies constituted a protected form of political speech under *Noerr-Pennington.* In reaching his decision, the judge applied a balancing test in which he weighed the competitive purpose and effect of the conduct against the First Amendment goals of protecting freedom of political expression and the right to petition the government. Although the judge acknowledged the conduct to be a boycott, he found it to be a permissible form of expression, since it was not primarily designed to injure competition (and, therefore, not within the sham exception to *Noerr-Pennington*) and might be the only effective method for the petitioners to bring their views to the government's attention. 486 F.Supp. at 768.

The issue facing the court in *Missouri v. NOW* concerned efforts by supporters of the Equal Rights Amendment to organize boycotts of convention facilities as a means of pressuring Missouri legislators to ratify the ERA Amendment. In concluding that this conduct did not violate the antitrust laws, **[43]** the court relied on two grounds for its decision: (1) the conduct in question did not represent the kind of anticompetitive, commercial behavior for which the Sherman Act was created, and (2) the boycott activity was protected by *Noerr-Pennington* because it furthered the expression of political views. Although the court invoked the *Noerr-Pennington* doctrine in support of its decision, a fair reading of the opinion indicates that the noncommercial, non-competitive relationship of the parties served as the primary reason for the court's conclusion that the antitrust laws were not applicable. In another boycott-type case, the Supreme Court has recently observed that, while a noncommercial boycott designed to force governmental and economic change is a form of constitutionally protected speech, the rights of business enterprises to associate together in ways that suppress competition may be curtailed. *NAACP v. Claiborne Hardware Co.,* 50 U.S.L.W. 5122, 5129–20 (July 2, 1982).

These cases suggest that protected political speech within the *Noerr-Pennington* context is not limited to simple oral or written statements. It is clear that First Amendment protection extends to certain forms of nonverbal conduct as well as verbal communication. *See* Note, *NOW or Never: Is There Antitrust Liability For Noncommercial Boycotts?,* 80 Colum. L. Rev. 1317 (1980). On the other hand, as the Supreme Court indicated in *California Motor Transport,* "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 404 U.S. at 513–14.[34] In a similar vein, the Ninth Circuit Court of Appeals concluded that *Noerr-Pennington* immunity would not extend to influencing public officials by threats or other coercive measures. *Sacramento Coca-Cola,* 440 F.2d at 1099. The issue before us here is whether the activities of MSMS constitute the kind of illegal conduct that brings them outside the protective shield of *Noerr-Pennington.* [44]

MSMS' conduct not only involved efforts to persuade legislators and Medicaid officials, but its actions also directly interfered with competitive relationships, both among MSMS members and between MSMS and the Medicaid program. To be sure, any joint lobbying campaign may affect the competitive process apart from whatever outcome is sought in the government forum. For example, individual participants may compromise their views for the sake of presenting a united front, and the advocacy campaign itself, irrespective of its ultimate success, may have subtle long-term effects on the competitive interaction among industry members. These potentially adverse side effects, of course, are tolerable in light of the more important goals of preserving freedom of political expression and the right to petition the government.

Here, however, the evidence is unambiguous that MSMS went further and threatened physician withdrawal, in whole or in part, from Medicaid if reimbursement cuts were not restored and "per-case" participation was not allowed. While the threats may not have been quite as bold as they were in the case of BCBSM, the evidence is quite clear that MSMS, through the collection of proxies and the adoption of a resolution stating that members would no longer be "encouraged" to participate in Medicaid, intended to convey the message that it had clout, and would exercise that clout, to achieve its aims. In such circumstances, where more direct restraints are placed on the com-

[34] Although the Supreme Court in *Noerr* indicated that misrepresentations made in the course of a lobbying campaign to the legislature would not trigger potential antitrust liability, in *California Motor Transport* the Court pointed out that false statements made in the context of an adjudicatory or administrative proceeding would fall outside the mantle of *Noerr-Pennington* protection and might give rise to an antitrust violation. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972).

petitive process—*e.g.*, through negotiation or coercive means—*Noerr-Pennington* protection would appear to be far less compelling.

In reviewing respondent's conduct in light of the rationale behind *Noerr-Pennington*, we are persuaded that subjecting the practices to antitrust scrutiny will not chill exercise of First Amendment rights. As we have pointed out, the conduct at issue goes beyond the "mere solicitation" of governmental action and is similar in nature to the kinds of arrangements that the Court in *Noerr* viewed as being within the traditional purview of the antitrust laws. Moreover, we do not believe a prohibition on MSMS entering or attempting to enter into agreements with governmental third party payers on reimbursement issues will deter respondent from effectively exercising its First Amendment rights. As we indicate below in connection with the proposed remedial order, MSMS will be able to provide information and express its views to government agencies on all aspects of reimbursement policy as well as other issues. **[45]**

While we believe this analysis effectively resolves the *Noerr-Pennington* issue, we briefly discuss another basis advanced by complaint counsel for excepting the conduct in question here from the scope of the doctrine. Put simply, complaint counsel argue that *Noerr-Pennington* does not apply to situations where the government is acting in a commercial or proprietary capacity in its dealings with private parties. This approach is suggested in *Geo. R. Whitten, Jr., v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), where the court stated the following:

> *Noerr* stressed the importance of free access to public officials vested with significant policymaking discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues. *Id.* at 33.

Similar support is expressed by several commentators. I P. Areeda & D. Turner, Antitrust Law 52 (1978); Fischel, *supra*, at 115; Note, Physician Influence: Applying *Noerr-Pennington* To The Medical Profession, 1978 Duke L.J. 701, 708. *But see Airport Car Rental*, 521 F. Supp. 568, 581 (N.D. Cal. 1981), *aff'd* 1982–83 Trade Cases (CCH) ¶65,039 at 70,791 (9th Cir., November 16, 1982), a case which recently held that there is no commercial exception to the *Noerr-Pennington* immunity.

This commercial exception applies to the facts here, it is claimed, because MSMS and its member physicians are in the role of providers or sellers of medical services for which the government is paying the bill. Whatever the merits of this approach, we decline to address it, since there is an independent basis for our action.

IX. The Order

To summarize the remedial order proposed by the ALJ, as modified by the suggestion of complaint counsel (CAB 55 n.3), MSMS would be prohibited from

- agreeing or attempting to agree with any of its members to affect the amount or manner of determining reimbursement, including agreements to cancel participation, refuse to complete forms, and the like;
- advocating that its members engage in the prohibited actions described above; [46]
- entering into or attempting to enter into any agreement with any third party payer concerning reimbursement;
- acting as an agent for any of its members in their dealings with third party payers concerning reimbursement or the acceptance or rejection of any participation agreement;[35] and
- threatening any coercive acts by any of its members with the purpose or effect of compelling any third party payer to accept positions taken by MSMS or any of its members concerning reimbursement.[36]

The first portions of the ALJ's order are intended to prevent the recurrence of agreements among horizontal competitors and coercive actions in the nature of a group boycott, such as the proxy efforts and departicipation campaigns. In separate paragraphs of the proposed order (II. A. and II. B.), both the agreement to engage in coercive action and the advocacy or attempted organization of such collective behavior are prohibited. Furthermore, paragraph II. E. specifically prohibits coercive threats of action by MSMS members to compel any third party payer to accept terms of reimbursement or participation. These provisions are narrowly directed toward respondent's organization and encouragement of a concerted refusal to deal and toward its agreements with members affecting prices. In addition to these prohibitions, paragraph II. C. and D. of the proposed order limit MSMS' ability to reach joint agreements with third party payers over reimbursement terms. Like the prohibition against agreements among competitors to take collective, coercive action, these provisions are designed to prohibit direct competitors from using the vehicle of a

[35] The prohibition against MSMS acting as agent for its members was intended by complaint counsel to apply only to third party payers.

[36] The ALJ's order specifically would not apply to MSMS'

a) peer review of individual physicians' fees,

b) exercise of First Amendment rights before any state or federal government agency or body concerning legislation or rules or in any administrative or judicial proceeding, or

c) responses to requests for information or opinion by any third party payer.

common agent to reach collective agreements with third party payers over reimbursement terms. [47]

There is little specific dispute about the appropriateness of the order's prohibitions against coercive activities or the encouragement of such conduct (even respondent's counsel suggests that a ban against boycotts would be appropriate if any relief is ordered, RAB 55). Respondent does express particular concern about the restrictions in paragraph II. C, which preclude MSMS from entering or attempting to enter into any agreement with third party payers on the subject of reimbursement, citing several circumstances in which such efforts are thought to be desirable. We will respond to that challenge momentarily, but it is first instructive to specify what the proposed order would not preclude.

The ALJ's order would not prevent MSMS from participating in peer review of individual physicians' fees. Nor would it preclude MSMS from providing information or opinions in response to a request from a third party payer, so long as respondent does not seek to reach an agreement with the third party payer. Furthermore, respondent's discussion with third party payers of an issue like the uniform claim form, which does not in any foreseeable way involve reimbursement, would not be prohibited. (O.A. Tr. 48, 33) Similarly, the order would not prohibit MSMS from bringing perceived violations of state law to the attention of third party payers. Finally, although Medicaid falls within the definition of a third party payer, MSMS would not be prohibited by the ALJ's order from participating in any proceeding of an agency of the State of Michigan regarding Medicaid. (O.A. Tr. 50) Nor would MSMS be barred from advocating its views to the legislature or other agencies, so long as it does not seek to extract an agreement or otherwise engage in coercive behavior. We believe that this interpretation is consistent with our reading of the scope of MSMS' First Amendment rights under the *Noerr-Pennington* doctrine.

Apart from its specific concerns with the order, alluded to previously, respondent generally argues that the ALJ's order is excessive in light of the nature of the violations. It argues further that the order trenches upon the prerogatives of the State of Michigan, which must rely upon MSMS' views with respect to cost-containment and physician distribution.

Respondent claims that the ALJ's proposed order would impermissibly infringe upon its First Amendment rights as well as those of its members. With respect to the members, MSMS asserts that the order restricts the freedom of individuals to express their opinions in public. (RAB 59) The order, however, would affect no individuals except those acting as official representatives or [48] agents of the Michigan State

Medical Society—*i.e.*, those persons who must be bound at a minimum to prevent the circumvention of an order against the organization. Of course, even officers of the Society would be free to express their own personal opinions. As for the respondent itself, the order limits its rights of free speech only to the minimal extent necessary to prevent the recurrence of the violations found here. Thus, we reject respondent's contention that the order would unnecessarily restrict activities that are not illegal. (RAB 56) As we point out below, in discussing our further modifications to the order, the relief is restrained and closely related to the conduct found to be unlawful.

Respondent contends further that the order would preclude it from committing its members to accept the specific fees or other reimbursement terms of insurance plans proposed by third party payers through the Michigan Health Care Economic Coalition, an organization of private providers, insurers and employers. (RAB 56–7) Although the order would not allow respondent to enter into binding agreements or threaten boycotts if acceptable terms cannot be agreed upon, our order specifically would permit MSMS to participate in the Coalition's discussions and provide information or advice to the Coalition concerning the interpretation or feasibility of particular proposals. In the context of the example cited by respondent—*i.e.*, a UAW-designed plan to assist the unemployed—the order would not prevent MSMS from informing the Coalition about any specific problems its members might have in providing services to, or collecting fees from, the unemployed.[37]

As to its other claims that it would be unable to participate in interdisciplinary health-planning organizations, the operation of the order is not as MSMS asserts. Respondent claims that the order would place it in jeopardy for participating in the Governor's Task Force on Physician Reimbursement and the Statewide Health Coordinating Council, on which it has state-appointed representatives. (RAB 57–58) MSMS also charges that the order conflicts with two Michigan statutory schemes expressly calling for third party payers to negotiate with health care providers. One statute, the appropriations law for the Department of Social Services, Pub. Act No. 35, Section 68(1), 1981 Mich. Legis. Serv. 234 (West), provides, in pertinent part, that [49]

> In conjunction with association representatives of allopathic and osteopathic physicians . . ., the department of social services shall develop, through negotiations, an alternative reimbursement system for physicians.

[37] There is no suggestion in the testimony of the only labor representative to testify in this proceeding, Mr. Melvin A. Glasser, Director of the UAW's Department of Social Security, that the issuance of an order similar to that proposed by the ALJ would impair the ability of his union's members, whether employed or unemployed, to obtain satisfactory health care coverage. (Glasser Tr. 423 *et seq.*) The order will in no way interfere with the ability of the UAW to obtain useful information from providers.

The other, the Nonprofit Health Care Corporation Reform Act, Pub. Act No. 350, Section 505(1), 1980 Mich. Legis. Serv. 1464 (West), provides, in pertinent part, that a

> health care corporation may negotiate with one or more organizations that represent providers . . . in the development . . . of the provider class plan . . . .

In light of these statutory schemes, we offer the following comments. First, the ALJ's order contemplates that MSMS may provide responsive information and comments to third party payers, even as to reimbursement, so long as MSMS does not reach or attempt to reach an agreement with those parties concerning reimbursement terms. Additionally, under *Noerr-Pennington* principles, respondent may provide input into state Medicaid proceedings. Although the order would prohibit negotiations in contemplation of an agreement, there appears to be no role envisioned by the cited Michigan statutes or the operation of the aforementioned private task forces that is seriously hampered by the order. We would also make it quite clear that nowhere in these proceedings has the respondent raised a state-action defense to the charges or the contemplated relief; thus, there is no claim before us that the MSMS is compelled by state law to act in any way that contravenes the terms of this order.

Moreover, in light of the evidence and arguments presented in this case, we are reluctant to construe these state statutes in a fashion that conflicts with antitrust law or mandates that physicians engage in boycotts, coercion, threats or any other form of anticompetitive activity at issue here. Statutory mechanisms that contemplate exchanges of useful information between provider groups and insurers or state agencies should not be interpreted—without clear evidence, which is lacking here—to mandate conduct that necessarily constitutes a violation of antitrust laws. *Cf. Baxter Rice v. Norman Williams Co.,* 50 U.S.L.W. 5052, 5043–54 (July 1, 1982) (discussing the showing required to establish a conflict between a state statute and federal antitrust law). By permitting MSMS to provide input to third party payers, short of entering into agreements with them on behalf of its members, our order will not frustrate the **[50]** performance of any legitimate function of the Medical Society under the cited statutes. We also note that the State of Michigan did not appear as *amicus curiae* in these proceedings to argue or demonstrate otherwise.[38]

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[38] Respondent has attached as an appendix to its Reply Brief a letter addressed to it from Mr. Dempsey, the Director of Michigan's Department of Social Services, in which he expresses concern that the ALJ's order would forbid the continued cooperation of MSMS and his department on cost-containment and other issues. (RRB A-1) Likewise, a letter to MSMS from Mr. Gerald Miller, Director of Michigan's Department of Management and Budget, suggested that the ALJ's order would restrain MSMS from "engaging in negotiations pertaining to physician reimbursement." (RRB A–2) These letters were not a part of the record in this matter nor were they addressed to the Commission. Nonetheless, we acknowledge the concerns expressed therein and emphasize that

(footnote cont'd)

Although we believe the ALJ's order is generally reasonable, we nonetheless find it appropriate to modify the proposed order in several respects, one of which deals with the medical society's concern about its role as representative or spokesman for its members. Before explaining our modifications, however, it is important to expand upon our finding that the order generally is quite reasonable and related directly to respondent's illegal conduct.

The standard by which to judge remedial orders is whether the relief sought is a reasonable method of eliminating the consequences and preventing the recurrence of law violations. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 698 (1978). In that case the Court recognized that a remedial order to correct or prevent a law violation might curtail the exercise of liberties otherwise enjoyed, just as a prohibition against price fixing "abridges the freedom of businessmen to talk to one another about prices." *Id.* at 697. But the "First Amendment does not 'make it impossible ever to enforce laws against agreements in restraint of trade . . . .'" *Id.* quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). Furthermore, in remedying an antitrust violation, "it is not necessary that all untraveled roads be left open and that only the worn one be closed." *International Salt Co v. United States,* 332 U.S. 392, 400 (1947). Thus, in *Professional Engineers,* the Court found that a prohibition against the adoption of an ethical code banning competitive bidding was reasonable. The Court also observed that where the ordered party fears that the [51] remedy imposed will block legitimate paths of expression, it bears the burden of showing the adverse consequences to the court in seeking a modification. 435 U.S. at 698–99.

It is well settled that the FTC is also empowered to issue remedial orders reasonably related to the violations found to exist. In *AMA,* the Second Circuit held that

> it is well established law that it is within the discretion of the FTC to determine whether an order is "necessary to cope with the unfair practices found." 638 F.2d at 451, quoting *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965).

In reaching that decision, the Second Circuit relied upon *Professional Engineers* in holding that, in the remedial context, the AMA's range of expression on the ethics of physicians' contract practices may be restricted. 638 F.2d at 452. The *AMA* court ruled that the Commission's order banning restrictions on certain advertising and contractual arrangements was not overbroad, since it restrained only speech itself found to violate the FTC Act. The court held that

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our modification of the ALJ's order ameliorates any potential loss of information and input from MSMS, as it prohibits only joint *agreements* among horizontal competitors and third party payers specifically affecting price or reimbursement.

[T]he Commission "must be allowed effectively to close all roads to the prohibited goal, so that its orders may not be by-passed with impunity, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952), by the state and local medical societies." *Id.* at 453.

Similarly, the Ninth Circuit has recently held that

Any remedy formulated by the FTC that is reasonably necessary to the prevention of future violations does not impinge upon constitutionally protected commercial speech. *Litton Industries, Inc.* v. *Federal Trade Commission,* 676 F.2d 364, 373 (9th Cir. 1982).

These rulings are consistent with recent Supreme Court precedents on the scope of First Amendment protection. In *Central Hudson Gas & Electric Co. v. Public Service Commission,* 447 U.S. 557 (1980), the Court set out standards to be met by governmental orders that restrict protected expression. While requiring that the order directly advance a stated governmental interest and be no more extensive than necessary to serve that interest, the test also inquires into whether the speech is accurate and unrelated to illegal conduct—if it is related to or constitutes illegal conduct, the speech may lose its constitutional protection. *See* Sullivan, *First Amendment Defenses In Antitrust Litigation,* 46 Mo. L. Rev. 517, 573 (1981). Thus, we find the order before us to be reasonable, necessary and well within the bounds of judicially established remedial standards. [52]

Our clear purpose in crafting a remedy is to prevent agreements and boycotts or similar coercive threats of collective action to fix or affect prices. We believe that it is necessary and appropriate to prohibit MSMS and its members—direct competitors in the eyes of the law—from agreeing or joining together to affect specifically reimbursement amounts, terms or methods of calculation. We emphasize that we are not proposing to prohibit all collective activities simply because they may have some possible effect on fees. In fact, paragraphs II. A. & B. spell out specific forms of illegal conduct which, though not inclusive, clearly illustrate the kinds of concerted behavior proscribed by the order. The order is further warranted to prohibit MSMS from advocating or urging that its members engage in the activities otherwise prohibited by the order. Finally, there is an obvious need to prohibit MSMS from threatening any third party payer with collective actions by its members in order to affect the terms of reimbursement.[39] Even so, the ALJ's order, as modified below, does

[39] We also observe that the scope of our adjudicative order is consistent with consent orders entered by courts in Justice Department cases involving circumstances very similar to the Medicaid portion of this matter. Recently, for example, an association of nursing homes was enjoined from engaging in

(a) any concerted refusal by nursing homes to participate in Medicaid;

(b) any agreement, understanding, or course of conduct with the purpose or foreseeable effect that nursing homes will jointly accept or reject any terms of Medicaid participation, jointly reject Medicaid patients, or jointly threaten not to participate in Medicaid;

(c) advocating or recommending that nursing homes individually do any of the three actions enumerated above;

(footnote cont'd)

not [53] impose an outright prohibition on MSMS expressing its views or the views of its members to third party payers. Stated as plainly as possible, it would not preclude communications that fall short of agreements or attempts to reach agreements on reimbursement.

We now turn to respondent's concern about the provisions of the order (II. C. & D.) that would restrict MSMS' latitude in acting as the representative or agent of its members with respect to their positions on reimbursement. We believe that a few modifications will preserve the essential feature of these provisions—*i.e.,* forbidding respondent from acting as an agent for purposes of negotiating agreements or engaging in coercive conduct—while allowing MSMS greater freedom to communicate with third party payers in a non-binding, non-threatening fashion.[40] As presently drafted, paragraph III. C. of the order permits respondent to provide information and opinions in response to requests from third parties. This exception recognizes that MSMS may have a useful role to play in offering suggestions and advice to third party payers on a wide variety of issues, including reimbursement. We believe that the potential value of this role is not limited to responsive communications but extends as well to similar communications initiated by respondent. Therefore, we have modified paragraph III. C. to make that clear.[41]

There is, of course, some inherent danger in allowing any collective dialogue with third party payers on questions directly related to reimbursement amounts or policies. Nevertheless, we believe that this risk is reasonable so long as the order clearly proscribes agreements with third party payers, whether extracted by negotiation or coercion, and any conduct in furtherance of such a result. As we pointed out previously, our order permits the efficient exchange of information and ideas between providers and insurers while guarding against the concerted imposition of price-related agreements by competing health care providers.

Inevitably, there will remain some definitional questions as to

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(d) or causing or permitting at any meeting of the association any discussion or course of conduct having the purpose or foreseeable effect that nursing homes will jointly do any of those three things.

United States v. Montana Nursing Home Ass'n, Inc., 5 (CCH) Trade Reg. Rep. ¶50,816 (D. Mont. April 13, 1983). To the same effect is an almost identical consent order prohibiting another association of nursing homes from acting as an agent for its members in connection with any decision to accept or reject all or any terms of Medicaid participation. *United States v. South Carolina Health Care Ass'n*, 1980–2 (CCH) Trade Cases ¶63,316 (D.S.C. April 22, 1980). *See also United States v. Geneva County (Ala.) Bar Ass'n.*, 1982–1 (CCH) Trade Cases ¶64,699 (M.D. Ala. April 15, 1982) (prohibiting a bar association for ten years from participating in activities or communications the purpose or effect of which is to fix fees or formulate or encourage the use of any list or guide on fees).

[40] For example, the mere fact that MSMS conveys its concerns to BCBSM or Michigan Medicaid about a particular reimbursement policy, and the third party insurer thereafter changes its policy, is unlikely, without more, to be construed as an agreement prohibited by the order. If, however, the overall course of dealing indicates that respondent is acting in a fashion that purportedly commits its members collectively to accept or reject a third party proposal, the chances are much greater that the order will apply.

[41] It should also be pointed out that neither this case nor the order addresses the appointment of physician representatives, whether by MSMS or by any other group, to serve on the boards of third party payers or other medical organizations.

whether activity crosses the prohibited borders to constitute an illegal agreement or an attempt to reach one. As with any remedial order, in MSMS' compliance with these restrictions there may be a small attendant loss of otherwise permissible activity. But, as the Court in *Professional Engineers* observed, where this occurs it is a necessary consequence of remedying the law violation. 435 U.S. at 697. We believe, [54] though, that our modified order minimizes any dampening of legitimate representative behavior while banning that activity which we have found unlawful. To the extent that MSMS faces uncertainty over contemplated communications, we reiterate the suggestion of *Professional Engineers* that the respondent may obtain further guidance in post-order proceedings.

To this end, we have modified the ALJ's order so that II. C. now prohibits respondent from

C. Entering into or attempting to enter into any agreement or understanding, either on its own behalf or as representative of any of its members, with any third party payer concerning the amount, manner of calculating, or terms of reimbursement, or concerning the decision of any of its members jointly to accept or reject the terms or conditions of any participation agreement.

Paragraph II. D. of the ALJ's order is deleted. Conduct that would have been prohibited by that provision will be barred by the other provisions *only* if it involves collective agreements, attempted agreements or coercive conduct associated with reimbursement issues or members' decisions to accept or reject the terms of participation agreements. Neither paragraph II. C., as modified, nor the other provisions of the order would otherwise ban MSMS from providing third party payers with information, advice or opinions relating to reimbursement. Finally, paragraph III. C. of the ALJ's order, which would have directed that MSMS could only respond to requests by third party payers for such information (but could not initiate such communications), has been modified to reflect the expanded range of discourse allowable under our decision.[42] With these modifications, we issue the attached order against the Michigan State Medical Society.

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[42] We have also made a few additional modifications to the order. In paragraph III. B. of the ALJ's order, the reference to "bona fide" exercise of First Amendment rights is deleted. In light of our discussion of the nature and scope of such rights, we regard the insertion of that term as superfluous and possibly confusing. With respect to Part IV of the order, we have modified paragraph A. to require that only a copy of the order be sent to members. To require that the entire decision be mailed to every member seems unduly burdensome and unnecessary. In paragraph B. we have eliminated the requirement that the order be published on the "first pages" of the Society's two regular publications; and in paragraph C. we have shortened the period from ten years to three years during which MSMS must provide new members with a copy of the order. Since we are not dealing with a long-established practice, there is less need for prolonged notification to new members. The other provisions in paragraph C. and Part V are necessary to assure continued effective compliance with the order.

CONCURRING STATEMENT OF COMMISSIONER PERTSCHUK

I agree fully with the Commission's opinion except that I join Commissioner Bailey in concluding that the conduct should have been judged *per se* unlawful. Because I believe a determination that a *per se* analysis should have been applied here is somewhat more difficult than in other cases, it may be useful to elaborate on how that determination should have been made.

In *Broadcast Music,*[1] the Supreme Court indicated that, once an arrangement has been identified as "price-fixing," it is *per se* unlawful; however, such a determination "will often, but not always, be a simple matter."[2] In that case, in fact, the Court found that a blanket licensing scheme in which composers agreed on a single price for use of all their compositions should not be condemned as unlawful *per se* even though it might be price-fixing in a "literal sense."[3] The rationale for inquiring about competitive effects under a rule of reason analysis was, in part, that there were tenable arguments that the arrangement could help competition because it amounted to a separate product that was not available to the entertainment media by offerings of individual composers. [2]

In *Maricopa*[4] the Court examined an arrangement in which foundations for medical care, composed of competing physicians, adopted maximum fee schedules after consulting with local medical societies and submitting proposed schedules to a vote of the entire membership of the foundations. The foundations had arranged with approved insurers that the insurers would agree to pay any charges up to the approved maximums and that the member physicians would accept these reimbursement levels as payment in full. Unlike the licensing arrangement in *Broadcast Music,* however, the Court found that this arrangement offered no tenable arguments of procompetitive benefits. It did not amount to a new risk-sharing entity in competition with other insurers, but essentially was "an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers."[5]

Here we examine conduct by competing physicians which amounted to a threatened refusal to deal with health insurers unless reimbursement rates were fixed at particular levels. The most that can be said for MSMS' agreement was that, technically, it did not directly establish the fees that competing physicians charged, but only the fees that the insurers paid. Yet, because of the great importance of

[1] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979).
[2] *Id.* at 9.
[3] *Id.* at 8.
[4] *Arizona v. Maricopa Medical Society,* 50 LW 4687 (June 15, 1982) (80–419).
[5] *Id.* at 4693.

third party payments, not only in Michigan, but all across the country, reimbursement levels have become the most central aspect of price in health care [3] transactions. The novelty of medical price-fixing is that all of us who pay health insurance premiums or taxes are victims, not merely those who receive services.

There is not even an argument here that MSMS' conduct was aimed at establishing a new competitive entity or that the efforts to force insurers to pay uniform levels of fees across the state led to efficiencies in fee determination, as was half-heartedly proposed in *Maricopa*.[6] Thus, this case is actually much stronger than *Maricopa* in justifying *per se* condemnation of MSMS' attempt to force changes in reimbursement levels.

I do not quarrel with the Commission opinion's careful assessment of the nature of the commercial transactions here and a limited examination of proffered justifications. This analysis is a necessary predicate to concluding that the arrangement fits "into the horizontal price fixing mold."[7] Once that determination is made, however, as I believe it should have been, a conclusion that the conduct is unlawful *per se* necessarily follows.

CONCURRING STATEMENT OF COMMISSIONER BAILEY

If I could agree that price-fixing by medical doctors should be subject to a rule of reason analysis (Slip Op. at 34), I would agree completely with the majority opinion. I believe the analysis conducted in the opinion convincingly demonstrates that MSMS' fee-related concerted behavior cannot be justified as procompetitive or as having no competitive effects.

However, the Supreme Court has clearly and consistently told us that once it is determined that a collaboration fosters price-fixing, no examination of alleged procompetitive justifications for that behavior is warranted. Further, "the nature of [the collaborators'] occupation, standing alone, does not provide sanctuary from the Sherman Act. . . ." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975). Very recently, in *Arizona v. Maricopa County Medical Society,* 102 S.Ct. 2466 (1982), the [2] Court applied this principle to a combination of competing physicians who were found to have engaged in maximum fee setting and unequivocally concluded that "the fact that doctors [were] parties to the price fixing agreement" could not change the analysis. 102 S.Ct. at 2475.

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[6] *Id.* at 4692.

[7] *Id.* at 4693. This limited examination is for the purpose of determining the essential nature of the restraint, not overall competitive effects and "[t]he scrutiny occasionally required must not merely subsume the rule of reason [citing *Professional Engineers*], or else we should apply the rule of reason from the start." *Broadcast Music* at 19, fn. 33.

Here we are faced with collective actions that were intended to influence directly third party payments to physicians.[1] (Slip Op. 31) Because those payments represent the bulk of physicians' service fees, the doctors' united front had the potential to inhibit price and non-price competition both among doctors and among insurance companies. (Slip Op. 33, 35) I do not see room in the long line of precedent on price-fixing for an artificial distinction between conduct which involves direct fee setting and conduct which tampers with the method of setting fees. Therefore I would not qualify the description of the conduct before us by saying it "approaches the kind of behavior that previously has been classified as *per se* illegal". (Slip Op. 34) I think such conduct must, under present law, be viewed as classic price fixing. [3]

> Any combination which tampers with price structures is engaged in an unlawful activity. . . . to the extent that [members of the price-fixing group] raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 218 (1940) *quoted in Maricopa,* 102 S.Ct. at 2474.

Therefore, I would have foregone inquiry into whether MSMS' fee-related collective activities had actual or potential offsetting benefits to competition.

Final Order

This matter having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined for the reasons stated in the accompanying Opinion to deny the appeal of respondent:

It is ordered, That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be, and it hereby is, entered. [2]

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[1] In my opinion, only in its claim that it fought reductions in Medicaid payments in order to preserve quality of care for low-income patients did respondent raise a colorable alternative explanation for its conduct. However, as the majority opinion clearly describes, the record will not support this assertion: MSMS' true purpose in threatening a boycott of the program was to increase physician reimbursements. (Slip Op. 16–19) Therefore the Medicaid incidents must be characterized as merely another battle in respondent's long campaign against third party influence on doctors' pricing practices.

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *MSMS* means Michigan State Medical Society, its House of Delegates, Council, committees, officers, representatives, agents, employees, successors and assigns.

B. *Third-party payer* means any person, corporation, government agency or other entity which agrees to pay for or reimburse all or part of any expense for physicians' services incurred by another person or group of persons. *Third-party payer* includes, but is not limited to, Blue Cross and Blue Shield of Michigan, and Medicaid.

C. *Medicaid* means the program of health care for indigent persons created by Title XIX of the Social Security Act, entitled "Grants to States for Medical Assistance Programs," 42 U.S.C. 1396 *et seq.* (1976 & Supp. III 1979), including regulations, policies and procedures of Michigan that implement the program in Michigan.

D. *Reimbursement* means money paid by a third-party payer for physicians' services.

E. *Physician* means a doctor of medicine or of osteopathy.

F. *Participation agreement* means any agreement between a third-party payer and a physician in which the third-party payer agrees to pay the physician for the provision of physicians' services and in which the physician agrees to accept payment from the third-party payer for the provision of physicians' services. [3]

II.

It is further ordered, That MSMS shall cease and desist from:

A. Entering into or attempting to enter into any agreement or understanding, either express or implied, with any MSMS members to affect or attempt to affect the amount, manner of calculating, or terms of reimbursement, including but not limited to, any agreement or understanding that:

1. any MSMS members will cancel or refuse to enter into participation agreements;

2. any MSMS members will refuse to complete claim forms used by any third-party payer;

3. MSMS can act on behalf of any members through proxy, power of attorney, or otherwise, to cancel or refuse to enter into any participation agreement; or

4. any MSMS members will sign or enter into participation agree-

ments only on terms acceptable to MSMS or to any other MSMS member.

B. Advocating, suggesting, urging, advising, inducing or recommending that any MSMS members engage in any action to affect or attempt to affect the amount, manner of calculating, or terms of reimbursement, including, but not limited to, advocating, suggesting, urging, advising, inducing or recommending that any MSMS members:

1. cancel or refuse to enter into any participation agreement with any third-party payer;

2. refuse to complete claim forms used by any third-party payer;

3. agree to permit MSMS to act on behalf of any MSMS members through proxy, [4] power of attorney, or otherwise, to cancel or refuse to enter into any participation agreement; or

4. sign or enter participation agreements only on terms acceptable to MSMS or to any other MSMS member.

C. Entering into or attempting to enter into any agreement or understanding, either on its own behalf or as representative of any of its members, with any third-party payer concerning the amount, manner of calculating, or terms of reimbursement, or concerning the decision of any of its members jointly to accept or reject the terms or conditions of any participation agreement.

D. Making any express or implied threat of acts by any MSMS members, or engaging in any other acts, with the purpose or effect of coercing, compelling or inducing any third-party payer to accept a position taken by MSMS or any MSMS members concerning the amount, manner of calculating, or terms of reimbursement, or the terms or conditions of any participation agreement.

III.

It is further ordered, That this Order shall not be construed to prevent MSMS from:

A. Participating in professional peer review of fees charged by individual physicians in individual cases.

B. Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

C. Providing information or views, on its own behalf or on behalf of its members, to third party payers concerning any issue, including reimbursement. [5]

IV.

It is further ordered, That MSMS:

A. Mail a copy of this Decision and Order to each of its component societies, each of its specialty sections, and a copy of the Order to each of its members within thirty days following service of this Order.

B. Publish this Order in an issue of *Michigan Medicine* published no later than 60 days after the date the Order is served, and in the first *Medigram* published after the Order is served. The Order shall be published in the same type size normally used for articles which are published in *Michigan Medicine* and in the *Medigram.*

C. For a period of three years, provide each new MSMS member with a copy of this Order at the time the member is accepted into membership.

D. Require, as a condition of affiliation with MSMS, that any component society or specialty section agree by action taken by its governing body to be bound by the provisions of Parts I–III of this Order.

V.

It is further ordered, That MSMS shall file a written report with the Commission within ninety days of the date of service of this Order, and annually on the anniversary date of the original report for each of the five years thereafter, and at such other times as the Commission may by written notice to MSMS require, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That MSMS shall notify the Commission at least thirty days prior to any proposed change to itself, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this Order.

Commissioner Douglas did not participate.

IN THE MATTER OF

CHAMPION HOME BUILDERS CO.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9151. Complaint, Feb. 5, 1981—Decision, Feb. 17, 1983

This consent order requires a Drydon, Mich. manufacturer and seller of solar energy equipment, among other things, to cease making false or unsubstantiated representations concerning the performance, durability, quality and maintenance requirements of its solar energy equipment. Also prohibited are unsubstantiated claims concerning the energy- and money-savings potential realized from use of such equipment. The order requires the company to contact all purchasers of its equipment and inform them that the company is offering cash settlements to eligible persons. Those accepting the cash settlement would waive any legal claims they may have against the company, and any rights to receive service or repairs under the manufacturer's warranty. Additionally, the company must send a warning package to all purchasers of its equipment, notifying them of precautions that should be taken to minimize any potential for fire in Champion-manufactured solar energy equipment.

Appearances

For the Commission: *Marilyn J. Holmes, Joel Winston, T. Bringier McConnell, Anne V. Maher, Lewis Morris* and *Michael Dershowitz.*

For the respondent: From *Dykema, Gossett, Spencer, Goodnow & Trigg, Howard E. O'Leary,* Washington, D.C. and *Fred Woodworth,* Detroit, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Champion Home Builders Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, *solar energy equipment* shall mean any device or piece of equipment designed to collect and store heat from the sun's rays and transfer the heat for use in heating water or air space indoors, or any component thereof,

manufactured, sold or distributed by respondent, including the "Solar Furnace."

PAR. 2. Respondent Champion Home Builders Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 5573 E. North Street, Dryden, Michigan.

PAR. 3. Respondent has been engaged in the manufacture, offering for sale, sale, and distribution of solar energy equipment. Respondent has operated through distributors and dealers in more than 30 states.

PAR. 4. In the course and conduct of its business, respondent has caused the said solar energy equipment, when sold, to be transported from manufacturing plants located in various States of the United States to dealers and distributors thereof located in various other States of the United States. In the further course and conduct of its business, respondent has disseminated and caused to be disseminated by its dealers and distributors advertisements, promotional literature, and other written materials concerning respondent's solar energy equipment by various means, including the insertion of advertisements in magazines with national circulation and the distribution of promotional materials to consumers, for the purpose of inducing and in a manner likely to induce, directly or indirectly, the purchase of said products in commerce. Respondent at all times mentioned herein has maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business respondent has, directly or by implication, through advertisements, promotional literature or other written materials, made representations as to the performance, durability, reliability, and quality of its solar energy equipment. Typical and illustrative of these statements and representations, but not all-inclusive thereof, are the following:

Respondent's Solar Furnace "should work automatically with little or no maintenance;"

Respondent's Solar Furnace is "virtually maintenance free;"

* * * * * * *

Respondent's Solar Furnace is built "with quality longlife materials;"

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Respondent's Solar Furnace collector is built of "high temperature

materials" and can withstand temperatures "up to 375° F." without damage;

* * * * * * *

Consumers "can have confidence in the Solar Furnace built and backed by Champion Home Builders Company! . . .—60 Factories from Coast to Coast!—22–Year Record of High Quality Mass-Production!—3,200 Dealers Nationwide to Provide Prompt Service!;"

Respondent's Solar Furnace is "backed by a national network of trained dealers;"

* * * * * * *

Respondent's Solar Furnace has been "independently tested—3rd party verification tests [were] completed by two professional engineering firms;" and

Respondent's Solar Furnace "has been completely tested by two independent third-party engineering firms—Midwest Engineering and Barber Nichols, both of Denver, Colorado."

PAR. 6. Through the use of the statements and representations set forth in Paragraph Five, respondent has represented directly or by implication that:

(1) Respondent's Solar Furnace does not have any defect which substantially impairs the reliability, durability, or performance of the Solar Furnace;

(2) Little or no maintenance is required to keep Solar Furnaces in operating condition;

(3) All Solar Furnaces and the materials and components therein are durable and reliable;

(4) Respondent's Solar Furnace collector is not adversely affected by high temperatures;

(5) Respondent has 60 factories producing solar energy equipment, has a 22-year record of mass producing high-quality solar energy equipment, and has 3,200 trained dealers nationwide to provide prompt service on its solar energy equipment; and

(6) Competent, independently-conducted tests have verified the performance or quality of respondent's Solar Furnaces.

PAR. 7. In truth and in fact:

(1) Respondent's Solar Furnace suffers or may suffer from one or

more defects, including but not limited to controller malfunctions, foam insulation expansion, and wood frame outgassing, which substantially impair or may substantially impair the reliability, durability, or performance of the Solar Furnace;

(2) Respondent's Solar Furnace and the components thereof experience a high rate of failure and require extensive maintenance and repairs on a regular and continuing basis;

(3) Several of the materials and component parts in respondent's Solar Furnace are not durable or reliable;

(4) Respondent's Solar Furnace collector is adversely affected by high temperatures;

(5) Respondent does not have and has never had 60 factories producing solar energy equipment; does not have and has never had a 22-year record of mass producing high-quality solar energy equipment; does not have and has never had 3,200 trained dealers nationwide to service its solar energy equipment; and

(6) The performance or quality of respondent's Solar Furnace has not been verified by competent, independently conducted tests.

Therefore, the statements and representations set forth in Paragraphs Five and Six were and are false, misleading, or deceptive.

PAR. 8. In the course and conduct of its business, respondent has, directly or by implication, through advertisements and other promotional materials, made representations as to the thermal performance and cost recovery or "payback" potential of its solar energy equipment. Typical and illustrative of these statements and representations, but not all-inclusive thereof, are the following:

Respondent's Solar Furnace "has been shown to replace 45% to 90% of annual home fuel needs of any present forced-air heating system when used in conjunction with" respondent's "Solar Insulation Package;"

Respondent's Solar Furnace "provides 45% to 90% of your heat;"

* * * * * * *

Respondent's model 96 Solar Furnace will supply a projected 56 to 76 percent of the fuel requirements of a 5,000 degree day house in Washington, D.C.;

Respondent's Solar Furnace has an "estimated percentage capability" of providing 72 percent "of average heating requirements for the 270 day heating season" for a 1,000 square foot, 5,000 degree day house in Washington, D.C.;

* * * * * * *

Respondent's model 96 Solar Furnace, "installed on a solar insulated 1,000 square foot home in Dover, Delaware," will pay for itself in eight years;

* * * * * * *

"Dollar for dollar, Btu for Btu," respondent's Solar Furnace "is the best solar heating system available today;"

Respondent's Solar Furnace "is an investment in real property, a home improvement which has a tendency to become worth more and more;" and

Respondent's Solar Furnace tends "to go up in value year by year."

PAR. 9. At the time the representations and statements set forth in Paragraph Eight were made, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, the representations set forth in Paragraph Eight were and are deceptive, misleading, or unfair.

PAR. 10. The advertisements and promotional materials referred to in Paragraph Eight represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Eight. In truth and in fact, respondent had no reasonable basis for such representations. Therefore, the representations set forth in Paragraph Eight were and are deceptive, misleading, or unfair.

PAR. 11. A significant number of Solar Furnaces are subject to or potentially subject to one or more conditions which are costly to correct or may significantly affect the quality, reliability, durability or performance of the Solar Furnaces. Such conditions include but are not limited to controller malfunctions, motor malfunctions, foam insulation expansion and air leakage, and wood frame outgassing. Respondent knew or should have known and failed to disclose to purchasers of Solar Furnaces facts which relate to the existence, nature and extent of these conditions. Respondent's failure to disclose these material facts which, if known to prospective purchasers, would have been likely to affect their purchasing decisions, was and is deceptive or unfair.

PAR. 12. The use by respondent of the aforesaid false, misleading, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid

false, misleading, unfair, or deceptive statements, representations, acts, and practices, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations are true and complete, and to induce a substantial number of such persons to purchase from respondent said solar energy equipment by reason of said erroneous and mistaken belief.

PAR. 13. The acts and practices of respondent as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(f) of its Rules; and

Respondent and complaint counsel having thereafter submitted modifications to the consent agreement by letter dated January 14, 1983;

Now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Champion Home Builders Co. is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 5573 East North Street, in the City of Dryden, State of Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this Order, the following definitions shall apply:

(1) *Solar energy equipment* shall mean all space heating or cooling or water heating equipment utilizing energy from the sun, including but not limited to Solar Furnaces and solar collectors manufactured by respondent, whether sold under the Champion brand name or another brand name.

(2) *Solar Furnace* shall mean the solar heating equipment manufactured by respondent between approximately 1976 and 1979, consisting of a self-contained A-frame structure with a collector and storage compartment, including but not limited to equipment designated by respondent, or possessing the same design and physical characteristics as equipment designated by respondent, as models 96, 128, 160, 1500, 2000, and 2500, whether sold under the Champion brand name or another brand name.

(3) *Solar collector* shall mean the solar heating equipment manufactured by respondent between approximately 1976 and 1979, consisting of a glass-covered box with a dark absorber surface over which air can pass, including but not limited to the product marketed under the name "Champion Vertafin Collector."

(4) *Solar collector system* shall mean each distinct system of solar collector(s), air handlers, and controls.

(5) As used in this Order, the requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting orally, visually, in writing, or in any other manner, directly or by implication.

(6) *Competent and reliable scientific test* shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate and reliable results.

(7) *Purchaser* shall mean any person who purchased a Solar Furnace or solar collector for his or her own use as heating equipment or as a demonstrator, and who did not sell any Solar Furnace or solar

collector (except for second-hand resale of the Solar Furnace or solar collector purchased by such person for his or her own use). This term shall include any dealer as defined below who did not sell any Solar Furnace or solar collector (except for second-hand resale of the Solar Furnace or solar collector purchased by such dealer for his or her own use).

(8) *Dealer* shall mean any person authorized by respondent, by a distributor of respondent, or by a licensee or a distributor of a licensee of International Solarthermics Corporation, to sell Solar Furnaces or solar collectors to purchasers.

(9) *Eligible direct purchaser* shall mean any purchaser who purchased a Champion brand name Solar Furnace or solar collector, as new. This term shall not include any purchaser who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

(10) *Eligible direct dealer* shall mean any dealer who purchased a Champion brand name Solar Furnace or solar collector, as new, for his or her own use as heating equipment or as a demonstrator, and who sold at least one but less than three Solar Furnaces and solar collectors to purchasers. This term shall not include any dealer who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

(11) *Eligible licensee purchaser* shall mean any purchaser who purchased a Solar Furnace or solar collector of a brand name other than Champion, as new. This term shall not include any purchaser who, prior to April 1, 1982, waived all claims with respect to the Solar Furnace or solar collector in exchange for monetary compensation, or who received a judgment in a court of law for monetary damages or for a full or partial refund of the purchase price in an action against respondent with respect to the Solar Furnace or solar collector.

PART I

It is ordered, That respondent Champion Home Builders Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any solar energy

equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in any manner that:

(1) Respondent's solar energy equipment does not have any defect which substantially impairs the reliability, durability, or performance of the equipment;

(2) Little or no maintenance is required to keep respondent's solar energy equipment in operating condition;

(3) Respondent's solar energy equipment, or any material or component thereof, is durable or reliable;

(4) Respondent's solar energy equipment, or any material or component thereof, is not adversely affected by high temperatures;

(5) Respondent has 60 factories producing solar energy equipment, has a 22-year record of mass producing solar energy equipment, or has 3,200 trained dealers nationwide to provide prompt service on its solar energy equipment; or

(6) Competent, independently conducted tests have verified the performance or quality of respondent's solar energy equipment;

unless such representation is true, and unless, at the time that the representation is made, respondent possesses and relies upon a competent and reliable scientific test or other objective material which substantiates the representation.

B. Representing in any manner the thermal or economic performance or efficiency, energy savings, heat output, cost recovery, "payback" potential, or investment potential of respondent's solar energy equipment unless such representation is true, and unless, at the time that the representation is made, respondent possesses and relies upon a competent and reliable scientific test or other objective material which substantiates the representation.

C. Misrepresenting in any manner:

(1) The reliability, durability, performance capabilities, or maintenance requirements of respondent's solar energy equipment;

(2) The production capabilities, manufacturing experience, or service capabilities of respondent relating to solar energy equipment; or

(3) The results or conclusions of any test upon which respondent relies to substantiate any representation relating to solar energy equipment.

PART II

It is further ordered, That respondent shall:

A. Within 45 days after the date of service of this Order, determine the names and last known addresses of all purchasers and the names and last known addresses of all dealers. In making these determinations, respondent shall search all relevant records in its possession, custody, or control, and shall obtain and search all relevant service and repair records maintained by International Solar Technologies, Inc. as of the date of service of this Order.

B. Send by first-class mail, address correction requested, within 45 days after the date of service of this Order, to the last known address of each purchaser and dealer identified by respondent pursuant to Subpart A of this Part or identified by the Federal Trade Commission or its staff, a notice package consisting of: (i) a copy of the letter attached to this Order as Attachment A, incorporated herein by reference, with the return date filled in; (ii) a copy of the questionnaire form attached to this Order as Attachment B, incorporated herein by reference, with the return date filled in; (iii) a self-addressed, postage-paid envelope; and (iv) an envelope containing the materials described in subsections (i) through (iii) and bearing the legend "CHAMPION SOLAR PROGRAM, IMPORTANT CASH SETTLEMENT OFFER." For the purposes of this Subpart, the return date shall be the date 90 days after the date of service of this Order.

Respondent shall also send by first-class mail a notice package to each person who, within 85 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a purchaser or dealer, and who has not received a notice package or received a notice package but subsequently lost it. The notice package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent may refrain from sending a notice package to any person identified pursuant to Subparts A or B of this Part who respondent's records conclusively show is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser.

C. Determine all eligible direct purchasers, eligible direct dealers, and eligible licensee purchasers. These determinations shall be based upon all information received by respondent from returned Attachment B questionnaires, and all other information in respondent's possession, as of the date 105 days after the date of service of this Order.

Provided that respondent may determine that a person is or is not an eligible direct purchaser, eligible direct dealer, or eligible licensee

purchaser notwithstanding the information provided by such person in an Attachment B form if respondent's records conclusively show that the person does or does not meet the definition of eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser as set forth in Definitions (9), (10), and (11) of this Order.

D. Determine a tentative cash settlement amount for each eligible direct purchaser and eligible direct dealer identified pursuant to Subpart C of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector and shall consist of the following:

(1) $1500 for each Solar Furnace or solar collector system purchased by an eligible direct purchaser who currently owns the unit(s) or who disposed of the unit(s) not for value;

(2) $1000 for each Solar Furnace or solar collector system purchased by an eligible direct purchaser and subsequently disposed of for value; and

(3) $750 for each Solar Furnace or solar collector system purchased by an eligible direct dealer which was purchased for the dealer's own use, either as heating equipment or as a demonstrator.

Provided that if the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) through (3) of this Subpart exceeds $375,000, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement amount by the ratio of $375,000 to the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) through (3).

E. Determine a tentative cash settlement amount for each eligible licensee purchaser identified pursuant to Subpart C of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector and shall consist of the following:

(1) $750 for each Solar Furnace or solar collector system purchased by an eligible licensee purchaser who currently owns the unit(s) or who disposed of the unit(s) not for value; and

(2) $500 for each Solar Furnace or solar collector system purchased by an eligible licensee purchaser and subsequently disposed of for value.

Provided that if the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) and (2) of this Subpart exceeds $150,000 plus any remaining portion of the $375,000 amount provided in Subpart D, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement

amount by the ratio of $150,000 plus any remaining portion of the $375,000 amount to the aggregate dollar value of all tentative cash settlements determined pursuant to subsections (1) and (2).

F. Send by first-class mail, within 125 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser who is determined pursuant to Subpart C of this Part: (i) a copy of the letter attached to this Order as Attachment C, incorporated herein by reference, with the tentative cash settlement amount and the return date filled in; (ii) a copy of the acceptance and waiver form attached to this Order as Attachment D, incorporated herein by reference, with the tentative cash settlement amount, the return date, and the date of the Attachment C letter filled in; and (iii) a self-addressed, postage-paid envelope. The tentative cash settlement amount shall be determined as provided in Subparts D and E of this Part. For the purposes of this Subpart, the return date shall be the date 155 days after the date of service of this Order.

G. Send by first-class mail, within 180 days after the date of service of this Order, a cash settlement check to each eligible direct purchaser and eligible direct dealer who returned to respondent a signed Attachment D form which was received by respondent on or before the date 170 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart D, subsections (1) through (3) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $375,000, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $375,000 to the aggregate dollar value of all cash settlements as determined above.

H. Send by first-class mail, within 240 days after the date of service of this Order, a cash settlement check to each eligible licensee purchaser who returned to respondent a signed Attachment D form which was received by respondent on or before the date 170 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart E, subsections (1) and (2) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $150,000 plus any undistributed portion of the $375,000 fund provided in Subpart G of this Part, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $150,000 plus any undistributed portion of the

$375,000 fund to the aggregate value of all cash settlements as determined above.

I. Send by first-class mail to each person who, within 86 to 270 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a purchaser or dealer, and who has not received a notice package as provided in Subpart B or who received a notice package as provided in Subpart B but subsequently lost it, a notice package consisting of: (i) a copy of the letter attached to this Order as Attachment E, incorporated herein by reference, with the return date filled in; (ii) a copy of Attachment B, with the return date filled in; (iii) a self-addressed, postage-paid envelope; and (iv) an envelope containing the materials described in subsections (i) through (iii) and bearing the legend "CHAMPION SOLAR PROGRAM, IMPORTANT CASH SETTLEMENT OFFER." For the purposes of this Subpart, the return date shall be the date 275 days after the date of service of this Order. The notice package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent may refrain from sending a notice package to any person who respondent's records conclusively show is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser.

J. Determine all additional eligible direct purchasers, eligible direct dealers, and eligible licensee purchasers. These persons shall include (i) persons whose Attachment B forms were received by respondent subsequent to the date 105 days after the date of service of this Order, and (ii) persons whose Attachment D forms were received by respondent subsequent to the date 170 days after the date of service of this Order. The determinations shall be based upon all information received by respondent from returned Attachment B questionnaires, and all other information in respondent's possession, as of the date 290 days after the date of service of this Order.

Provided that respondent may determine that a person is or is not an eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser notwithstanding the information provided by such person in an Attachment B form if respondent's records conclusively show that the person does or does not meet the definition of eligible direct purchaser, eligible direct dealer, or eligible licensee purchaser as set forth in Definitions (9), (10), and (11) of this Order.

K. Determine a tentative cash settlement amount for each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser identified pursuant to Subpart J of this Part. The tentative cash settlement amounts shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector

and shall consist of those amounts specified in Subpart D, subsections (1) through (3) and Subpart E, subsections (1) and (2) of this Part.

Provided that if the aggregate dollar value of all tentative cash settlements determined above exceeds $25,000 plus any undistributed portion of the $375,000 and $150,000 funds provided in Subparts G and H of this Part, then each tentative cash settlement shall be prorated by multiplying the tentative cash settlement amount by the ratio of $25,000 plus any undistributed portion of the $375,000 and $150,000 funds to the aggregate value of all cash settlements as determined above.

L. Send by first-class mail, within 310 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer and eligible licensee purchaser who is determined pursuant to Subpart J(i) of this Part: (i) a copy of Attachment C, with the tentative cash settlement amount and the return date filled in; (ii) a copy of Attachment D, with the tentative cash settlement amount, the return date, and the date of the Attachment C letter filled in; and (iii) a self-addressed, postage-paid envelope. The tentative cash settlement amount shall be determined as provided in Subpart K of this Part. For the purposes of this Subpart, the return date shall be the date 340 days after the date of service of this Order.

M. Send by first-class mail, within 310 days after the date of service of this Order, to each eligible direct purchaser, eligible direct dealer and eligible licensee purchaser who is determined pursuant to Subpart J(ii) of this Part and whose new tentative cash settlement amount is less than the tentative cash settlement amount previously determined for that person pursuant to Subpart D or E of this Part: (i) a copy of the letter attached to this Order as Attachment F, incorporated herein by reference, with the new tentative cash settlement amount and the return date filled in; (ii) a copy of Attachment D, with the new tentative cash settlement amount, the return date, and the date of the Attachment F letter filled in; and (iii) a self-addressed, postage-paid envelope. The new tentative cash settlement amount shall be determined as provided in Subpart K of this part. For the purposes of this Subpart, the return date shall be the date 340 days after the date of service of this Order.

N. Send by first-class mail, within 365 days after the date of service of this Order, a cash settlement check to each eligible direct purchaser, eligible direct dealer, and eligible licensee purchaser who did not receive a cash settlement check as provided in Subparts I and J, and who returned to respondent a signed Attachment D form which was received by respondent on or before the date 355 days after the date of service of this Order. Each cash settlement shall be in the amount determined as provided in Subpart D, subsections (1) through (3) and

Subpart E, subsections (1) and (2) of this Part, and shall be determined according to the status of the person at the time of purchase of each Solar Furnace or solar collector.

Provided that if the aggregate dollar value of all cash settlements as determined above exceeds $25,000 plus any undistributed portion of the $375,000 and $150,000 funds provided in Subparts G and H of this Part, then each cash settlement shall be prorated by multiplying the cash settlement amount by the ratio of $25,000 plus any undistributed portion of the $375,000 and $150,000 funds to the aggregate value of all cash settlements as determined above.

O. Send by first-class mail a copy of the letter attached to this Order as Attachment G, incorporated herein by reference, with the appropriate box checked, to each person who is determined to be ineligible for a cash settlement under the provisions of this Order or whose Attachment D form was not received by respondent on or before the date 355 days after the date of service of this Order. The copy of Attachment G shall be sent within ten days after the determination of ineligibility is made or the Attachment D form is received by respondent.

P. Use all reasonable efforts to determine the correct and complete name and last known address of a purchaser or dealer in each instance where the records searched by respondent do not provide correct or complete information, and use all reasonable efforts to determine the correct eligibility and status of a person in each instance where the returned Attachment B form contains insufficient, ambiguous, or conflicting information. Such efforts shall include, but not be limited to, searches of respondent's records and requests for additional information by mail or telephone calls.

Q. In each instance where a letter or notice package provided for by Part II of this Order is returned by the Post Office undelivered and respondent is provided with a corrected address, remail the letter or notice package to the corrected address within five days after respondent's receipt of the corrected address from the Post Office.

R. Establish and maintain a telephone number which persons may call to receive information and materials relating to the programs provided in this Part and in Part III of this Order.

PART III

It is further ordered, That respondent shall:

A. Within 45 days after the date of service of this Order, determine the names and original addresses of all persons who purchased Solar Furnaces or solar collectors, including purchasers, dealers, distribu-

tors of respondent, licensees of International Solarthermics Corporation, and distributors of licensees of International Solarthermics Corporation. In making these determinations, respondent shall search all relevant records in its possession, custody, or control.

B. Send by third-class mail, within 45 days after the date of service of this Order, to the original address of each person who purchased a Solar Furnace or solar collector identified by respondent pursuant to Subpart A of this Part or identified by the Federal Trade Commission or its staff, a warning package consisting of: (i) a copy of the letter attached to this Order as Attachment H, incorporated herein by reference; (ii) two copies of the sign attached to this Order as Attachment I, incorporated herein by reference, consisting of a white self-adhesive label of latex impregnated material, no smaller than four inches by six inches, with the first line printed in red in thirty-six point type and the second line printed in red in twenty-four point type; and (iii) an envelope containing the materials described in subsections (i) and (ii) bearing the legend "IMPORTANT SOLAR EQUIPMENT WARNING" and addressed as follows: "(Name of Person) or Current Resident."

Respondent shall also send by first-class mail a warning package to each person who, within 365 days after the date of service of this Order, contacts respondent or about whom respondent receives information indicating that the person may be a current owner of a Solar Furnace or solar collector, and who has not received a warning package or who received a warning package but subsequently lost it. The warning package shall be sent within five days after respondent's receipt of the contact or information.

Provided that respondent shall substitute on the envelope containing copies of Attachments H and I the name of the current owner of the Solar Furnace or solar collector for the name of the person who purchased the Solar Furnace or solar collector, if respondent's records show that the person who purchased the Solar Furnace or solar collector no longer owns the unit and if respondent's records contain the name of the current owner.

Provided that respondent may refrain from sending a warning package to any person identified pursuant to Subpart A of this Part who respondent's records conclusively show is not a current owner of a Solar Furnace or solar collector.

C. Use all reasonable efforts to determine the correct and complete name and original address of a person who purchased or owns a Solar Furnace or solar collector in each instance where the records searched by respondent do not provide correct or complete information. Such efforts shall include, but not be limited to, searches of

respondent's records and requests for additional information by mail or telephone calls.

PART IV

It is further ordered, That:

A. Respondent shall maintain documents and records demonstrating the manner and form of respondent's compliance with Part I of this Order, including:

(1) Documentation in support of and upon which respondent relies in making any representation concerning the reliability, durability or performance of solar energy equipment, and any other documentation which contradicts, qualifies, or otherwise calls into question any representation concerning the reliability, durability or performance of solar energy equipment, included in advertising or sales promotional materials disseminated by respondent or by any officer, representative, agent, employee, subsidiary, or division of respondent;

(2) Documentation or written results of tests performed in connection with carrying out the provisions of Part I, Subparts A and B of this Order.

Such documentation shall be retained by respondent for a period of three (3) years from the date such advertising or sales promotional materials were last disseminated, and may be inspected by the Commission or its staff upon reasonable notice.

B. Respondent shall maintain documents and records demonstrating the manner and form of respondent's compliance with Parts II and III of this Order, including but not limited to those reflecting:

(1) Efforts made and actions taken by respondent to identify, locate, contact, and provide cash settlements to persons as provided in Part II of this Order;

(2) Efforts made and actions taken by respondent to identify, locate and mail notices to addresses and persons as provided in Part III of this Order;

(3) The names, original addresses, and last known addresses of all persons required to be determined as provided in Part II, Subparts A and P and Part III, Subparts A and C of this Order;

(4) The name and address of each person to whom a notice package is sent as provided in Part II, Subparts B and I of this Order;

(5) The name and address of each person who is determined to be eligible and each person who is determined to be ineligible for a cash settlement as provided in Part II, Subparts B, C, I and J of this Order;

(6) The name and address of each person who receives a cash settle-

ment as provided in Part II, Subparts G, H and N of this Order, and the amount of each refund;

(7) The Attachment B and Attachment D forms returned to respondent as provided in Part II, Subparts C, G, H, J and N of this Order;

(8) Any information used in making determinations of eligibility and ineligibility as provided in Part II of this Order;

(9) The name and address of each person who disputes a determination of ineligibility or cash settlement amount made as provided in Part II of this Order, the nature of such person's dispute, and the resolution of the dispute;

(10) All written communications, and a log of all telephonic communications which includes a summary of the communications, between respondent and any person relating to the programs provided in Parts II and III of this Order;

(11) The name and address of each person to whom an Attachment H letter is sent as provided in Part III of this Order.

Such documents and records shall be maintained by respondent for a period of three (3) years from the date of the creation of the document or record, and may be inspected by the Commission or its staff upon reasonable notice.

PART V

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its operating divisions, to its successors and assigns, and to each of its officers, agents, representatives, or employees who have sales, marketing, advertising, servicing, warranty, or policy responsibilities with respect to the subject matter of this Order.

PART VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

PART VII

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this Order, and within eighteen months after the date of service of this Order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form in which it has complied with this Order.

ATTACHMENT A

[Champion letterhead] [Date]

Dear :

Our records show that you may have purchased a Solar Furnace or solar collector manufactured by Champion Home Builders Co. Champion has recently started a program to offer cash settlements of at least several hundred dollars each to certain people who purchased solar energy equipment sold under the "Champion" and other brand names. You may be eligible for a cash settlement under this program. Please read this letter and follow the steps listed below.

This program is part of an agreement between the Federal Trade Commission (FTC) and Champion. The FTC had alleged that Champion's Solar Furnaces and solar collectors did not provide as much heat as represented and required a great deal of maintenance and repairs. Although Champion does not admit this is true, we have agreed to offer these cash settlements.

HOW TO APPLY

In order to apply for a cash settlement, you *must* do the following:

(1) Fill out the enclosed questionnaire completely. This will be used to determine your eligibility for the cash settlement.

(2) If you owned more than one Solar Furnace or solar collector system, make extra copies of the questionnaire and fill out one for each Solar Furnace or solar collector system you owned.

(3) Return the completed questionnaire to us in the enclosed envelope. You must mail the questionnaire back to us by [return date] to make sure you are considered for the full settlement for which you may be eligible. If you are eligible for a cash settlement but we do not receive your completed questionnaire in time, you may get a lesser amount or you may get nothing.

Even if you no longer own the Solar Furnace or solar collector, or you were a dealer, or you bought a non-Champion brand, you may still be eligible for a cash settlement. Please fill out the questionnaire so that you may be considered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

Once we receive your completed questionnaire, we will determine if you are eligible for a cash settlement and let you know in writing within the next three months. If you are eligible, we will also tell you how much the settlement will be. Please let us know if you change your address in the next several months, so we can contact you again.

You will *not* have to return your Solar Furnace or solar collector if you decide to take the cash settlement. However, you *will* have to sign a waiver form which we will send you. By signing the waiver you will give up any rights you may have remaining under

a warranty if you got a warranty from Champion. You will also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you have any questions about this program, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the completed questionnaire to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT B

QUESTIONNAIRE

Please print your name, address, and telephone number. Then, answer the questions below by putting an "X" in the proper box.

Fill out a separate questionnaire form for each Solar Furnace or solar collector system you have owned. If you were a dealer, fill out a questionnaire form for each Solar Furnace or solar collector system you had for your own use as heating equipment or as a demonstrator.

Name: _____ Telephone: _____
Address: _____
_____ Zip Code: _____

1. Have you or your family ever bought a Solar Furnace or solar collector for your own use as heating equipment or as a demonstrator? (Answer yes if you bought the unit by itself or with your home.)
   [ ] Yes [ ] No
   If yes, from whom did you buy it?
   _____
   _____
   NOTE: If you answered yes, please answer the following questions. If you answered no, please skip to Question 11.
2. Did you buy the Solar Furnace or solar collector as new?
   [ ] Yes [ ] No
3. What is the brand name of the Solar Furnace or solar collector?
   [ ] Champion [ ] Other (please specify): _____.
4. If you own or owned a Solar Furnace, does the outside surface look like
   [ ] Aluminum or metal with a brown wood-grain pattern?
   [ ] Wood, fiberglass or other non-metallic material?
   [ ] Other (please specify): _____.
5. What is the serial number of your Solar Furnace or solar collector?
   _____.

NOTE: The serial number should appear on your warranty registration form. If you can't find your serial number, leave this answer blank.

6. Do you still own the Solar Furnace or solar collector?
   [ ] Yes [ ] No
7. If the answer to question 6 is no, did you:
   [ ] Sell the unit (either by itself or with your home)?
   [ ] Dispose of the unit without selling it or receiving any compensation?
   NOTE: If you sold the unit to someone else, please provide the name and address of the buyer: _____
   _____ .
8. Were you ever a dealer for Solar Furnaces?
   [ ] Yes (please specify brand name of equipment you sold): _____.
   [ ] No
   NOTE: If you answered yes, please answer the following questions. If you answered no, please skip to Question 11.
9. Did you buy the Solar Furnace or solar collector described above before you became a Solar Furnace dealer?
   [ ] Yes [ ] No
10. How many Solar Furnaces and Champion solar collector systems did you sell? (Do not count any units you bought for your own use and later sold second-hand.)
    [ ] None [ ] One or two [ ] More than two
11. Do you know anyone else who bought a Solar Furnace or Champion solar collector? If so, please provide their names and addresses:
    _____ _____
    _____ _____
    _____ _____

This completes our questions. If you have a copy of your bill of sale, warranty form, or other evidence of purchase, please enclose it with this form in the envelope we have provided. If you do not have anything like this, please return the form anyway. Evidence of purchase is *not* required for you to be eligible for a cash settlement, but will help us in reviewing your eligibility.

REMEMBER: YOU MUST FILL OUT THIS FORM AND MAIL IT TO US BY [return date] TO BE ELIGIBLE FOR A FULL CASH SETTLEMENT.

ATTACHMENT C

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission (FTC), Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. We have reviewed our records and the questionnaire that you returned and have determined that you are eligible for a cash settlement under this program.

AMOUNT OF YOUR CASH SETTLEMENT

The tentative amount of your cash settlement is [tentative cash settlement amount]. This amount was determined based on the number of Solar Furnaces or solar collectors you purchased and the circumstances under which you purchased them. The amount

of money you will actually receive may increase slightly if someone who is eligible decides not to accept a settlement, but this amount will *not* be lowered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

In order to obtain your cash settlement, you must sign and return the enclosed form entitled "Notice of Acceptance of Cash Settlement and Waiver of Claims." Please read this form and make your decision carefully. By signing and returning this form and accepting your cash settlement, you give up any rights you may have remaining under a warranty if you got a warranty from Champion. You also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you decide to accept the cash settlement and give up these rights, please sign the form and return it to us in the enclosed envelope. You *must* mail the signed form back to us by [return date] to make certain you receive your settlement. We will then mail you a check within the next two to four months. If we do not receive your signed form in time, you may get a smaller cash settlement or you may get nothing.

If you decide not to accept the cash settlement, please do not return the form. You will not give up any rights and you will not receive any money.

If you have any questions about this program, or if you change your address, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the signed waiver form to us by [return date].

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT D

NOTICE OF ACCEPTANCE OF CASH SETTLEMENT AND WAIVER OF CLAIMS

I hereby accept Champion's offer of a cash settlement, as contained in its letter of [date of Attachment C or F letter], in an amount not less than [tentative cash settlement amount].

In consideration of this cash settlement, I hereby release and discharge Champion Home Builders Co., its successors and assigns, and its directors, officers, agents, representatives, and employees, and its divisions and other subsidiaries, from any and all claims of every name and nature relating to solar energy equipment manufactured and sold by Champion Home Builders Co., including any claims I may have under any express or implied warranty, including any warranty of merchantability or fitness for particular use, from the beginning of time to the date of this instrument and forever after, except any claims for future personal injury or future property damage relating to the solar energy equipment.

_____ _____

(Date) (Signature)

_____

(Name)

_____

(Address)

_____

(City, State and Zip Code)

REMEMBER: YOU MUST SIGN THIS FORM AND MAIL IT TO US BY [return date].

ATTACHMENT E

[Champion letterhead] [Date]

Dear :

Our records show that you may have purchased a Solar Furnace or solar collector manufactured by Champion Home Builders Co. Champion has recently started a program to offer cash settlements of at least several hundred dollars each to certain people who purchased solar energy equipment sold under the "Champion" and other brand names. You may be eligible for a cash settlement under this program. Please read this letter and follow the steps listed below.

This program is part of an agreement between the Federal Trade Commission (FTC) and Champion. The FTC had alleged that Champion's Solar Furnaces and solar collectors did not provide as much heat as represented and required a great deal of maintenance and repairs. Although Champion does not admit this is true, we have agreed to offer these cash settlements.

HOW TO APPLY

In order to apply for a cash settlement, you *must* do the following:

(1) Fill out the enclosed questionnaire completely. This will be used to determine your eligibility for the cash settlement.

(2) If you owned more than one Solar Furnace or solar collector system, make extra copies of the questionnaire and fill out one for each Solar Furnace or solar collector system you owned.

(3) Return the completed questionnaire to us in the enclosed envelope. You must mail the questionnaire back to us by [return date] to make sure you are considered for the full cash settlement for which you may be eligible. If you are eligible for a cash settlement but we do not receive your completed questionnaire in time, you will receive no cash settlement.

Even if you no longer own the Solar Furnace or solar collector, or you were a dealer, or you bought a non-Champion brand, you may still be eligible for a cash settlement. Please fill out the questionnaire so that you may be considered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

Once we receive your completed questionnaire, we will determine if you are eligible for a cash settlement and let you know in writing within the next several months. If you are eligible, we will also tell you how much the settlement will be. Please let us know if you change your address in the next several months, so we can contact you again.

You will *not* have to return your Solar Furnace or solar collector if you decide to take the cash settlement. However, you *will* have to sign a waiver form which we will send

you. By signing the waiver you will give up any rights you may have remaining under a warranty if you got a warranty from Champion. You will also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you have any questions about this program, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the completed questionnaire to us by [return date]. Also, please remember to let us know if you change your address.

Sincerely yours,

Champion Home Builders Co.

Enclosures

ATTACHMENT F

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission, Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. Some time ago, we sent you a letter notifying you of your eligibility for a cash settlement under this program. We also sent you a form to sign in order to accept your cash settlement.

We have received back your signed acceptance form. Unfortunately, we did not receive it in time to include you in the first group of people eligible for cash settlements. For that reason, the amount of the cash settlement you can receive has changed. We are sending you this letter to notify you of the change in your cash settlement, and to obtain your approval of the new amount.

AMOUNT OF YOUR CASH SETTLEMENT

The tentative amount of your cash settlement is now [tentative cash settlement amount]. The amount of money you will actually receive may increase slightly if someone who is eligible decides not to accept a settlement, but this amount will *not* be lowered.

HOW TO OBTAIN YOUR CASH SETTLEMENT

In order to obtain your cash settlement, you must sign and return the enclosed form entitled "Notice of Acceptance of Cash Settlement and Waiver of Claims." You must do this even though you previously signed and returned a form.

Please read this form and make your decision carefully. By signing and returning this form and accepting your cash settlement, you give up any rights you may have remaining under a warranty if you got a warranty from Champion. You also give up your right to sue Champion for any existing claims you may have relating to your Solar Furnace or solar collector.

If you decide to accept the cash settlement and give up these rights, please sign the form and return it to us in the enclosed envelope. You *must* mail the signed form back to us by [return date] to make certain you receive your settlement. We will then mail you a check within the next two months. If we do not receive your signed form in time, you will receive no cash settlement.

If you decide not to accept the cash settlement, please do not return the form. You will not give up any rights and you will not receive any money.

If you have any questions about this program, or if you change your address, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

Remember: You must mail the signed waiver form to us by [return date].

Sincerely,

Champion Home Builders Co.

Enclosures

ATTACHMENT G

[Champion letterhead] [Date]

Dear :

As part of an agreement with the Federal Trade Commission (FTC), Champion Home Builders Co. is offering cash settlements to certain people who purchased Solar Furnaces and solar collectors manufactured by Champion. We have reviewed our records and the questionnaire that you returned and have determined that you are *not eligible* for this program, for the following reason:

[ ] Your Solar Furnace or solar collector was not manufactured by Champion.
[ ] You are not the original purchaser.
[ ] You were a Champion dealer and sold three or more Solar Furnaces or solar collectors.
[ ] You were a dealer of an International Solarthermics Corporation licensee and sold one or more Solar Furnaces or solar collectors.
[ ] You previously received a refund or monetary award from Champion.
[ ] Your information was received after the program had ended.
[ ] Other: _____

_____ .

If you believe that our determination is incorrect, please contact:

Champion Solar Program
c/o Champion Home Builders Co.
5573 E. North Street
Dryden, Michigan 48428

[Telephone number]

For a copy of the FTC agreement, write:

Federal Trade Commission
Public Reference Branch
Room 130
Washington, D.C. 20580

We regret that we cannot be of assistance to you.

Sincerely yours,

Champion Home Builders Co.

ATTACHMENT H

[Champion letterhead] [Date]

Dear Sir/Madam:

Our records indicate that you may own solar energy equipment manufactured by Champion Home Builders Co. As a result, we are sending you this important notice about your equipment.

IMPORTANT WARNING

Your Champion solar equipment contains wood and other flammable materials. Federal Government Agencies have recently expressed concern that wood in solar collectors may ignite when exposed to excessive heat over a long period of time. Although we do not expect a fire would occur under normal operating conditions, we recommend that these precautionary steps be taken.

1. CLOSE THE REFLECTOR SHIELD WHEN YOUR SOLAR EQUIPMENT IS NOT IN USE.

Always cover the collector when the unit is not operating to prevent build-up of excessive heat. Close the reflector shield to cover the collector during months you are not using your equipment. The reflector shield should also be closed if a motor or controller stops working, or if you have a power outage. If you do not have a reflector shield, use a tarpaulin or similar material to cover the collector.

2. NEVER SMOKE OR USE AN OPEN FLAME NEAR THE EQUIPMENT OR DUCTWORK.

Your Champion solar equipment and ductwork contain organic materials such as wood and polyurethane foam which can release toxic smoke if ignited. Therefore, you should never smoke or use an open flame, such as a butane torch, near the equipment or ductwork. The two warning labels enclosed with this letter should be glued to the outside of the Solar Furnace at the motor maintenance opening, and to the exposed ductwork inside your house.

3. INSTALL A SMOKE DETECTOR.

We believe that all homes should be equipped with smoke detectors. If you don't already have one, you should consider purchasing and installing a smoke detector in your home.

If you have any questions about this notice, you may call us at [telephone number].

Sincerely,

Champion Home Builders Co.

Enclosures

ATTACHMENT I

— WARNING —

Combustible Materials

Do not expose to open flames

In the Matter of

FOREMOST DAIRIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-1161. Consent Order, Jan. 23, 1967—Modifying Order, Feb. 17, 1983

This order reopens the proceeding and modifies the Commission's order issued on Jan. 23, 1967 (71 F.T.C. 56), by deleting Paragraph V from the order, so as to relieve respondent of the obligation of obtaining Commission approval prior to making certain acquisitions.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JANUARY 23, 1967

By a petition dated July 9, 1982, and supplements thereto dated October 14, 1982, November 16, 1982, and January 11, 1983, respondent Foremost-McKesson, Inc. (successor to Foremost Dairies, Inc.) ("Foremost") requests that the Commission reopen the proceeding in Docket No. C–1161 and delete Paragraph V of the order issued by the Commission on January 23, 1967. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Foremost's petition and supporting materials, and other relevant information, the Commission now finds that the public interest warrants reopening and modification of the order. The Commission has determined that absent special circumstances an order provision that requires prior Commission approval of acquisitions by the respondent should not exceed ten years in duration. The order in this case has been in effect for 16 years and the record does not demonstrate that continued prior approval of respondent's acquisitions is necessary.

Accordingly,

It is ordered, That this matter be, and it hereby is reopened and that Paragraph V of the Commission's order be and it is hereby deleted.

IN THE MATTER OF

PLASKOLITE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3104. Complaint, Feb. 23, 1983—Decision, Feb. 23, 1983

This consent order requires a Columbus, Ohio manufacturer and seller of interior-mounted plastic storm windows, among other things, to cease misrepresenting the performance capabilities of storm windows; the amount of savings that will result from installation of storm windows on a house already equipped with prime and storm windows; and the purpose, content or conclusions of tests or surveys used by the company to substantiate energy-related claims. Respondent is further barred from using the words "up to" or similar terms in energy-related claims, unless the maximum level of performance can be achieved by a significant number of consumers under normal circumstances, and the class of persons who can achieve this level of performance is disclosed. Additionally, respondent is required to retain documentation for energy-related claims for a period of three years.

Appearances

For the Commission: *Marilyn J. Holmes* and *Robert C. Cheek.*

For the respondent: *Eric F. Stoer,* Washington, D.C. and *G. Robert Lucas, Porter, Wright, Morris & Arthur,* Columbus, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Plaskolite, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Plaskolite, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1770 Joyce Avenue, Columbus, Ohio.

PAR. 2. Respondent has been engaged in the manufacture, advertising, promotion, offering for sale, sale and distribution of interior mounted plastic storm windows under the brand name "In-Sider."

PAR. 3. In the course and conduct of its business, respondent has

caused its interior mounted plastic storm windows, when sold, to be shipped from its manufacturing plants in Columbus, Ohio, to its distributors and retailers in various States of the United States. For the purpose of inducing the purchase of its interior mounted plastic storm windows by the consuming public, and in a manner likely to induce the purchase of said products in commerce, respondent has disseminated and caused the dissemination of certain advertisements and promotional materials through various means, including the insertion of advertisements in magazines with national circulation, and the distribution of promotional materials through the use of the United States mail. Respondent at all times mentioned herein has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. When installed with a double hung window, the In-Sider will cut heat loss through the window by 88%!

b. Triple glaze with the In-Sider (install the In-Sider in addition to a storm window or insulating window) and cut your heat loss by an additional 26%!

c. Actual test results show how much typical homes saved with In-Sider storm windows. . . . Heating $ Saved by Adding In-Sider: Boston, $156.62; Dallas, $49.97; Detroit, $87.33; Philadelphia, $54.63. Cooling $ Saved by Adding In-Sider: Boston, $85.00; Dallas, $170.00; Detroit, $45.00; Philadelphia, $31.00.

d. How much can you save? Field tests in three different American cities clearly show how much In-Siders can slash off a heating bill [in 1979]. . . . Projected Fuel Bill Savings Adding In-Siders to Prime Windows only: Philadelphia, $88.05; Boston, $252.20; Dallas, $52.53.

PAR. 5. In truth and in fact, contrary to respondent's representations set forth in Paragraph Four:

a. The In-Sider will not cut heat loss through many double hung windows by 88 percent.

b. The In-Sider will not cut heat loss by 26 percent in many instances where it is installed in addition to a storm window or insulating window.

c. The savings on heating and cooling costs set forth in Paragraph Four, subparagraph c. above are not actual test results. The test results referred to do not establish heating cost savings of $156.62 by installing In-Sider storm windows on a typical home in Boston. At the time the representations set forth in Paragraph Four, subparagraph c. above were made, a typical home in Boston would not have saved $156.62 on heating costs by installing In-Sider storm windows.

d. The field tests referred to in Paragraph Four, subparagraph d. above do not establish heating cost savings of $252.20 by installing In-Sider storm windows on a typical home in Boston. A typical home in Boston would not have saved $252.20 on heating costs in 1979 by installing In-Sider storm windows.

Therefore, said representations are deceptive or unfair.

PAR. 6. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. Installation of the In-Sider will "Save up to 88% of heat loss through windows."

b. Installation of the In-Sider "cuts heat loss through your window by up to 98.5%."

c. "And, if you have outside storm windows, the In-Sider increases their efficiency by up to 26%!"

PAR. 7. By and through the use of these and other representations, respondent has represented directly or by implication that:

a. Installing In-Sider storm windows will save an appreciable number of consumers 88 percent or close to 88 percent of heat loss through windows under circumstances normally and expectably encountered by consumers.

b. Installing In-Sider storm windows will reduce heat loss through windows for an appreciable number of consumers by 98.5 percent or close to 98.5 percent under circumstances normally and expectably encountered by consumers.

c. Installing In-Sider storm windows on a house that already has prime and storm windows will reduce heat loss for an appreciable number of consumers by 26 percent or close to 26 percent under circumstances normally and expectably encountered by consumers.

PAR. 8. In truth and in fact, contrary to respondent's representations set forth in Paragraph Seven:

a. Few, if any, consumers, under circumstances normally and expectably encountered, will save 88 percent or close to 88 percent of heat loss through windows by installing In-Sider storm windows.

b. Few, if any, consumers, under circumstances normally and expectably encountered, will reduce heat loss through windows by 98.5 percent or close to 98.5 percent by installing In-Sider storm windows.

c. Few, if any, consumers, under circumstances normally and expectably encountered, will reduce heat loss by 26 percent or close to

26 percent by installing In-Sider storm windows on a house that already has prime and storm windows.

Therefore, said representations are deceptive or unfair.

PAR. 9. In the course and conduct of its business, through the use of various advertisements and promotional materials, respondent has represented that:

a. "The In-Sider Storm Window substantially outperforms outside storm windows."

b. In-Sider storm windows "insulate far better than outside storm windows."

c. "The In-Sider is 1/3 more effective than a triple track window!!!"

PAR. 10. In truth and in fact, contrary to respondent's representations set forth in Paragraph Nine:

a. In-Sider storm windows do not substantially outperform many outside storm windows.

b. In-Sider storm windows do not insulate far better than many outside storm windows.

c. The In-Sider is not one-third more effective than many triple track windows.

Therefore, said representations are deceptive or unfair.

PAR. 11. At the time respondent made the representations alleged in Paragraphs Four, Six, Seven, and Nine, respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent's test protocols and calculations were not designed or conducted to assess product performance in a manner appropriate and relevant to the representations made. Therefore, said representations are deceptive or unfair.

PAR. 12. Respondent's advertisements and promotional materials represent, directly or by implication, that respondent possessed and relied upon a reasonable basis for making, at the time they were made, the representations alleged in Paragraphs Four, Six, Seven, and Nine. In truth and in fact respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent's test protocols and calculations were not designed or conducted to assess product performance in a manner appropriate and relevant to the representations made. Therefore, said representations are deceptive or unfair.

PAR. 13. The use by respondent of the aforesaid deceptive or unfair statements, representations, and practices, and the placement in the hands of its distributors and retailers of the means and instrumentali-

ties by and through which others may have used the aforesaid deceptive or unfair statements, representations, and practices, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of respondent's interior mounted storm window products by reason of said erroneous and mistaken belief.

PAR. 14. The acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Plaskolite, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1770 Joyce Avenue, in the City of Columbus, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to energy savings, efficiency or conservation, fuel savings, fuel cost savings, air infiltration, window or door sealing capabilities, conduction of heat, or heat gain or loss.

A *competent and reliable test* means any scientific, engineering, or other analytical report or study prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation, and analytical procedures that ensure accurate and reliable results.

Storm window means any transparent window covering, whether placed outside or inside an ordinary window, made of any material which is used to prevent or reduce air infiltration or exfiltration.

PART I

It is ordered, That respondent Plaskolite, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any storm window in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Misrepresenting in any manner, directly or by implication, the performance capabilities of any storm window or the ability of any storm window to reduce air infiltration, heat loss through the window, or heating costs.

(2) Misrepresenting in any manner, directly or by implication, the amount of savings that will result from installation of any storm window on a house that already has prime and storm windows.

(3) Making any energy-related claim unless, at the time that the claim is made, respondent possesses and relies upon a competent and reliable test or other objective material which substantiates the claim.

(4) Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test or study upon which re-

spondent relies as substantiation for any energy-related claim, or making any statement or representation which is inconsistent with the results or conclusions of any such test or study.

(5) Making any energy-related claim which uses the phrase "up to" or words of similar import, unless, (a) the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectably encountered by consumers, and (b) the class of persons who can achieve the maximum level of performance claimed is disclosed.

PART II

It is further ordered, That respondent maintain all documentation in support of and upon which respondent relies in making any energy-related claim and any other documentation that contradicts, qualifies, or otherwise calls into question any energy-related claim included in advertising or sales promotional material disseminated by respondent or by any officer, representative, agent, employee, subsidiary, or division of respondent, concerning the performance, efficiency or quality of any storm window. Such documentation shall be retained by respondent for a period of three years from the date such advertising or sales promotional materials were last disseminated, and may be inspected by the Commission staff upon reasonable notice.

PART III

It is further ordered, That, for a period of three years from the date of service of this Order, respondent forthwith deliver a copy of this Order to all present and future employees, personnel, or agents and representatives of respondent engaged in the creation, design, or dissemination of any advertisement promoting respondent's storm windows.

PART IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

PART V

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

Docket 9134. Interlocutory Order, Feb. 24, 1983

ORDER ESTABLISHING PROCEDURES FOR SUBMISSION OF PORTER REALTY CONSENT AGREEMENT

On February 11, 1981, complaint counsel and respondents, Irvin Porter and Porter Realty, Inc. ("broker respondents") executed an Agreement Containing Consent Order to Cease and Desist ("consent"). Thereafter, pursuant to a joint motion by the parties, the Administrative Law Judge ("ALJ") stayed the litigation with respect to these respondents. Trial of the remaining respondents ("subdivider respondents") was conducted from April 1981 into February 1982. On July 29, 1982, the ALJ issued an initial decision dismissing the complaint as to subdivider respondents. However, complaint counsel has acknowledged that the executed consent and supporting staff recommendation were not submitted to the Bureau of Consumer Protection for final approval so that the matter, as to broker respondents, could be withdrawn from adjudication in a timely fashion. *See* Complaint Counsel's January 24, 1983 Response to Commission's Order Directing Submission of Briefs at 2, Rules of Practice, Section 3.25(c), 16 C.F.R. 3.25(c).

Section 4.7(f) of the Commission's Rules of Practice, 16 C.F.R. 4.7(f), permit *ex parte* communications between complaint counsel and the Commission for the purpose of evaluating proposed consent settlements that are executed by some, but not all, respondents. However, to avoid any appearance that complaint counsel has obtained an advantage because of the status of the proposed consent, *it is hereby ordered* that all communications from complaint counsel to the Commission concerning the proposed consent signed by Porter Realty, Inc. and Irvin Porter be made on the record. Complaint counsel is also ordered to submit the consent agreement and any recommendations concerning it within sixty (60) days following issuance of this order. The proposed consent agreement will then be considered in conjunction with the adjudicative case now pending before the Commission.

IN THE MATTER OF

MORTON THIOKOL, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2707. Consent Order, July 21, 1975—Modifying Order, Feb. 28, 1983

This order reopens the proceeding and modifies the Commission's order issued on July 21, 1975 (86 F.T.C. 299). The modified order eases certain restrictions concerning the advertising of Lite Salt; gives the company more flexibility when making disclosures in advertising; and requires that Lite Salt labels state that it is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician."

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On July 23, 1982, Morton-Norwich Products, Inc.[1] and Needham, Harper & Steers Advertising, Inc., respondents in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered on July 21, 1975.

The consent order involves Morton Lite Salt® Mixture (Lite Salt)[2], a blend of equal amounts of sodium chloride and potassium chloride, or any product of similar composition. Petitioners marketed Lite Salt for people who desire to or should limit their sodium intake. The order prohibits claims that medical research has established a connection between sodium intake and high blood pressure or water retention, and that a reduction in sodium intake would promote or maintain good health. The Complaint charged that these claims had not been established to the satisfaction of the scientific community. In addition, the order requires a warning in all Lite Salt advertisements that the product is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician."

The petition of July 23, 1982, requests five changes in the consent order, which it summarized as follows:

(1) a change in the consent order's preamble to make clear that the order's advertising and labeling restrictions apply only to Morton's consumer-oriented promotional efforts and sales, rather than to the industrial food processing trade;

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[1] Morton-Norwich, Inc., changed its name to Morton Thiokol, Inc., after it filed the petition.

[2] Petitioners requested a change in the preamble language substituting "Morton Lite Salt® Mixture" for "Morton Lite Salt" to protect their trademark. The Commission has no objection to the change.

(2) the inclusion of a requirement that packages be labeled, "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician";

(3) a change in the advertising disclosure provisions which allows Morton the option of using in its advertising the cautionary statement "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician" or the statement "Read Label, Including Warnings";

(4) a change in the advertising disclosure provisions which removes the phrase "clear and conspicuous" and substitutes more specific disclosure requirements for television, radio, and print advertisements; and

(5) a change in the second proscriptive paragraph of the consent order to make clear that the order does not prohibit Morton from stating accurately the opinions of medical researchers and doctors concerning the effects of sodium consumption, provided that such representations are based on reliable and competent scientific evidence.

The petition included a Proposed Order that petitioners requested the Commission to substitute for the original order.

The change requested in the preamble language would result in the order applying only to the advertising and sale of Lite Salt or any product of similar composition "in a package intended to be purchased and used by consumers (*e.g.,* the 11 ounce container sold in grocery stores) and not to the advertising and sale of the product in institutional packages (*e.g.,* 80 pound sacks sold to food processors)." Morton did not market the product in institutional size sacks in 1975.

The Commission agrees that this change is justified. As petitioners point out,

> a food processor using the Product as an ingredient in its product would be sufficiently sophisticated to easily recognize that it should not be used in preparing a sodium-free or a potassium-free food. Moreover, food manufacturers are required to adhere to food labeling regulations as promulgated by the FDA, including regulations regarding the disclosure of ingredients in the order of predominance.

Petition at 17.

The second suggested change would add the following proscriptive paragraph to the modified order:

1. Failing to disclose on the label of such container, in the following words, or words of similar import, that such product is "Not To Be Used By Persons On Sodium or Potassium Restricted Diets Unless

Approved By A Physician." Such disclosure must be enclosed within a boxed outline and printed in type size that can clearly be read.

This provision is desirable because it requires, with minimal burden, the dissemination to interested consumers of important health information. Petitioners now include this warning on the product pursuant to an agreement reached with the Food and Drug Administration in 1974. Including this provision in the order gives the Commission clear authority to enforce the warning, and to ensure its prominence.

The third requested modification is that petitioners be allowed in advertising to substitute the warning "Read Label, Including Warnings" for the more extensive warning that the product is "Not To Be Used By Persons On Sodium or Potassium Restricted Diets Unless Approved By A Physician." Petitioners argue that so long as the more extensive warning appears in labeling, a requirement that it also appear in advertising is unnecessarily burdensome.

The Commission recognizes that all mandatory disclosures impose costs, occupy advertising space and compete with other useful information in advertisements—such as the benefits of the product—for consumers' attention. Consequently, disclosure requirements serve the public interest only if their benefits outweigh their costs and they are no more burdensome than necessary than to convey the intended message. The Commission has concluded that if advertising for Lite Salt discloses that the product contains sodium, more extensive warnings are not necessary in advertising.[3] The sodium content disclosure should be sufficient to alert consumers on sodium restricted diets to read the label of the product. There they will find a statement of the amount of sodium in the product, as well as the now required warning not to use the product without physician approval. The Commission does not believe it has a sufficient basis to require an advertising warning for this product directed only to persons on potassium restricted diets.

Accordingly, the Commission has modified the advertising disclosure requirement, with petitioners' agreement, to allow a disclosure of sodium content in lieu of the more extensive warning originally required.

Petitioners next ask the Commission to change the order's disclosure guidelines. The current order requires that disclosures be "clear and conspicuous." Petitioners' propose alternative definitions setting forth criteria for television, radio, and print advertising. Petitioners have agreed to modify the proposed television disclosure standards to

[3] The Commission does not, however, accept petitioners' argument that it should alter the health warnings because of alleged competitive disadvantages they impose.

require audio disclosure. With this change, the Commission believes these standards will ensure that the required information is adequately communicated.

The final modification concerns the order provisions prohibiting petitioners from representing that medical researchers or doctors have established (a) a connection between sodium intake and high blood pressure or water retention, or (b) that reducing the level of sodium intake will promote or maintain good health. The petition cites extensive evidence indicating that the vast majority of medical and scientific experts in this country are sufficiently certain of a link between sodium consumption and the development of high blood pressure to recommend a reduction in sodium consumption for the general population. This represents a change from the state of medical and scientific opinion in 1975 when the order was issued. At that time, many doctors and researchers were not prepared to take a position on the existence of a link between sodium consumption and the development of high blood pressure, and reduced sodium consumption was not widely recommended for the general public. Because the situation has changed dramatically since 1975, however, the Commission believes the evidence contained in the petition justifies modifying the order. The evidence indicates, however, that most experts do not believe that the link between sodium consumption and the development of high blood pressure has been conclusively established. Consequently, the Commission has, with petitioners' agreement, modified the order to allow respondents to make representations about the relationship between sodium consumption and high blood pressure or water retention if they posses a reasonable basis consisting of competent and reliable scientific documentation supporting the representations.

The modified order also prohibits claims that Lite Salt is a sodium-free salt substitute or that it is intended for use by persons on sodium or potassium restricted diets unless approved by a physician.

For the foregoing reasons, the Commission believes petitioners have made a satisfactory showing that changes in facts and the public interest require modifying the order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued July 21, 1975, in Docket No. C–2707 is hereby modified to read as follows:

Order

It is ordered, That respondent Morton Thiokol, Inc., a corporation, and respondent Needham, Harper & Steers Advertising, Inc., a corporation, their successors and assigns, either jointly or individually, and

respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of Morton Lite Salt® Mixture or any product of similar composition, packed in a container intended to be sold to, distributed to, or used by consumers, do forthwith cease and desist from:

1. Failing to disclose on the label of such container, in the following words or words of similar import, that such product is "Not To Be Used By Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician." Such disclosure must be enclosed within a boxed outline and printed in type size that can clearly be read.

2. Disseminating any advertising for such product packed in such container that fails to disclose:

a. The following words, or words of similar import: "Not For Persons On Sodium Or Potassium Restricted Diets Unless Approved By A Physician"; or

b. That such product contains sodium. This disclosure may be accomplished satisfactorily by describing such product as a mixture of salt (or sodium chloride) and potassium chloride or as containing one-half (1/2) the sodium of table salt.

For television advertisements, the required disclosure must be presented in the audio portions of the advertisement. The disclosure must be made in a manner such that it may be heard without undue distracting noise.

For print advertisements, the required disclosure must be of a type size that can clearly be read, and must appear enclosed in a boxed outline or otherwise appear prominently. If a coupon for such product is offered as part of any advertisement, the required disclosure need appear only in the main portion of the advertisement. If such product is advertised in conjunction with other products, the required disclosure need appear as part of or in close proximity to only that portion of the advertisement in which such product appears most prominently.

For radio advertisements, the required disclosure must be made in a manner such that it may be heard without undue distracting noise.

3. Making any representation, directly or indirectly, regarding the relationship between sodium consumption and high blood pressure or water retention unless, at the time the representation is made, respondents have in their possession a reasonable basis consisting of

competent and reliable scientific documentation to support such representation.

4. Making any representation, directly or indirectly, that Morton Lite Salt® Mixture is a sodium-free salt substitute.

5. Making any representation, directly or indirectly, that Morton Lite Salt® Mixture is intended for use by persons on sodium or potassium restricted diets, unless the representation is expressly limited to use approved by a physician.

Nothing in this order shall be construed to prohibit respondents from disseminating any advertisement of Morton Lite Salt® Mixture or any product of similar composition, that:

A. indicates that the product contains one-half the sodium of regular salt; or

B. indicates that the product is intended for persons (not including those on sodium or potassium restricted diets) who desire to reduce their intake of salt or sodium.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each officer or employee having direct responsibility for either the marketing or advertising of Morton Lite Salt® Mixture.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary, or any other change in the corporation that may affect compliance obligations arising out of the order.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

In the Matter of

NORTH AMERICAN PHILIPS CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3105. Complaint, March 7, 1983—Decision, March 7, 1983

This consent order requires a New York City corporation, among other things, to cease misrepresenting that the Black Pro Shaver or any other drug or device will cure or minimize "razor bumps." The company is required to have a reasonable basis for representations relating to the efficacy, performance or benefit of any drug, device or other product; barred from making statements which are inconsistent with reliable scientific or medical evidence; and prohibited from misrepresenting the extent or results of product testing. The order also requires that the company maintain specific records for a period of three years and provide its sales and advertising personnel with a copy of the order.

Appearances

For the Commission: *Mitchell Paul* and *Grace Polk Stern.*

For the respondent: *William B. Gerwig,* New York City.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North American Philips Corporation and McCaffrey and McCall, Inc., hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent North American Philips Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 100 East 42 Street, New York, New York.

Par. 2. Respondent McCaffrey and McCall, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 575 Lexington Avenue, New York, New York.

Par. 3. Respondent North American Philips Corporation is now, and for some time in the past has been, engaged in the manufacture,

importation, distribution, advertising and sale of electric shavers and other products to the public.

PAR. 4. Respondent North American Philips Corporation causes said products, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent North American Philips Corporation maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent North American Philips Corporation at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations in the sale and distribution of electric shavers and other products.

PAR. 6. Respondent McCaffrey and McCall, Inc. has been and now is an advertising agency of respondent North American Philips Corporation. Respondent McCaffrey and McCall has prepared, and has placed for dissemination, advertising material to promote the sale of various products of respondent North American Philips Corporation, including the Black Pro shaver.

PAR. 7. Respondent McCaffrey and McCall, Inc. at all times mentioned herein has been and now is in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. Respondent North American Philips Corporation is now, and for some time in the past has been, engaged in the manufacture, importation, distribution, advertising and sale of the Black Pro shaver, a product advertised as curing, mitigating, treating or preventing a shaving problem common to black men, specifically pseudofolliculitis barbae (hereinafter "razor bumps"), a skin disease primarily induced by shaving. As advertised, the Black Pro shaver is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their businesses, and for the purpose of inducing the sale of electric shavers and other products, respondents have disseminated and caused the dissemination of advertising for the Black Pro shaver in national magazines distributed by the mail and across state lines, and in radio broadcasts transmitted by radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondents have disseminated across state lines advertising for the Black Pro shaver in newspapers and catalogues, and have distributed by mail or other means, product brochures and other sales literature directly to con-

sumers or to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 10. Typical of the statements in the advertisements disseminated as previously described, but not necessarily inclusive thereof, are the following:

a. With the . . . Black Pro, razor bumps go away. And stay away.

b. [North American Philips Corporation] . . . and a leading black university have found a dramatic cure for your shaving problems. . . . Even in *daily* shaving. (emphasis in original)

c. The one that really works . . . Other companies have tried to come up with a razor bump cure. But only . . . [North American Philips Corporation] has succeeded. . . .

d. Razor bumps go away and stay away as proven in tests at a leading black university.

e. In a study conducted at a leading black university, black men suffering from razor bumps tested the . . . Black Pro Rotary Razor in daily shaving.

f. These unretouched photos prove that after shaving for six weeks with the . . . Black Pro, your skin can be free of razor bumps.

PAR. 11. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that:

a. Use of the Black Pro shaver will cure the condition of razor bumps.

b. Tests conducted at a leading black university prove that the Black Pro shaver will cure the condition of razor bumps.

c. The photographic demonstration depicted constitutes proof that the Black Pro shaver will cure the condition of razor bumps.

d. The efficacy of the Black Pro has been tested in a *daily* shaving regimen.

PAR. 12. In truth and in fact:

a. Use of the Black Pro shaver will not cure the condition of razor bumps.

b. Tests conducted at a leading black university do not prove that the Black Pro shaver will cure the condition of razor bumps.

c. The photographic demonstration depicted does not constitute proof that the Black Pro shaver will cure the condition of razor bumps.

d. The efficacy of the Black Pro has not been tested in a *daily* shaving regimen.

Therefore, the advertisements referred to in Paragraphs Eight and Nine were and are misleading in material respects, and constituted and now constitute false advertisements, and the representations set forth in Paragraph Eleven were and are false, deceptive or unfair.

PAR. 13. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that:

a. The Black Pro is effective in the treatment of razor bumps.

b. In six weeks, the typical user of the Black Pro will see his razor bumps disappear.

PAR. 14. At the time respondents made the representations alleged in Paragraphs Eleven and Thirteen, respondents did not possess and rely on a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations as alleged, constituted and now constitute unfair or deceptive acts or practices.

PAR. 15. Through the use of the advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent, directly or by implication, that they possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Eleven and Thirteen at the time of the representations' initial dissemination and each subsequent dissemination. In truth and in fact, respondents did not possess and rely on a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair or deceptive acts or practices.

PAR. 16. Respondents' use of the aforesaid deceptive or unfair statements and representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that such statements and representations are true, and into the purchase of substantial quantities of Black Pro shavers sold by respondent North American Philips Corporation by reason of such erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute unfair or deceptive acts or practices and unfair methods of competition, in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent North American Philips Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 100 East 42nd Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division

or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae (hereinafter sometimes referred to as "razor bumps").

2. Making any statement or representation, directly or by implication, that tests, studies or demonstrations prove or constitute proof that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae ("razor bumps").

Part II

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, by persons afflicted with "razor bumps" will reduce or minimize that condition or is efficacious for the treatment of "razor bumps", unless at the time of each dissemination of such statement or representation respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such statement or representation. Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

Part III

For purposes of Part IV and Part V of this order, the term *product* shall be defined as follows: electric and cordless shavers, microwave ovens and toaster ovens.

Part IV

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "product" as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, concerning the performance, or any other characteristic, feature, attribute or benefit of any product unless respondent possesses and relies upon a reasonable basis for such statement or representation at the time of its initial dissemination and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable evidence which substantiates such statement or representation.

2. Advertising any product by referring to or presenting evidence, including a test, survey, experiment, demonstration, study or report, or the results thereof, which evidence is represented, directly or by implication, as supporting, showing or proving the existence or nature of any fact or feature respecting such product when such evidence does not support, show or prove such fact or feature.

3. Making any statement or representation, directly or by implication, by reference to a test, survey, experiment, demonstration, study or report, unless such work has been designed, executed, and analyzed in a competent and reliable scientific manner and unless its purpose, content, validity, reliability, results, or the conclusions which may be drawn therefrom, are fairly and accurately represented.

Part V

It is further ordered, That respondent North American Philips Corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product, as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order.

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials, or post purchase materials making such claim or representation were last disseminated. Such records will be made available to the Commission staff for inspection upon reasonable notice.

Part VI

It is further ordered, That respondent shall forthwith, relative to the products specified in Part III, distribute a copy of this order to each of its concerned operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements or other sales materials concerning said products.

Part VII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Part VIII

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

MCCAFFREY AND MCCALL, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3106. Complaint, March 7, 1983—Decision, March 7, 1983*

This consent order requires a New York City advertising agency, among other things, to cease misrepresenting in advertisements that the Black Pro Shaver or any other drug or device will cure or minimize "razor bumps." The company is required to have a reasonable basis for advertising representations relating to the efficacy, performance or benefit of any drug, device or other product; barred from making statements which are inconsistent with reliable scientific or medical evidence; and prohibited from misrepresenting the extent or results of product testing. The order also requires that the company maintain specific records for a period of three years and provide its sales and advertising personnel with a copy of the order.

Appearances

For the Commission: *Mitchell Paul* and *Grace Polk Stern.*

For the respondent: *Arthur M. Klebanoff, Janklow, Traum & Klebanoff,* New York City.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has

*Complaint previously published at 101 F.T.C. 359.

violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent McCaffrey and McCall, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its executive office and principal place of business at 575 Lexington Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae (hereinafter sometimes referred to as "razor bumps").

2. Making any statement or representation, directly or by implication, that tests, studies or demonstrations prove or constitute proof that use of the Black Pro shaver, or any other electric shaver or other drug or device, will cure the condition of pseudofolliculitis barbae ("razor bumps").

Part II

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and

employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any electric shaver or any drug or device, as "drug" and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, that use of the Black Pro shaver, or any other electric shaver or other drug or device, by persons afflicted with "razor bumps" will reduce or minimize that condition or is efficacious for the treatment of "razor bumps", unless at the time of each dissemination of such statement or representation respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such statement or representation. Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

Part III

For purposes of Part IV and Part V of this order, the term *product* shall be defined as follows: electric and cordless shavers, microwave ovens and toaster ovens.

Part IV

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "product" as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statement or representation, directly or by implication, concerning the performance, or any other characteristic, feature, attribute or benefit of any product unless respondent possesses and relies upon a reasonable basis for such statement or representation at the time of its initial dissemination and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable evidence which substantiates such statement or representation.

2. Advertising any product by referring to or presenting evidence, including a test, survey, experiment, demonstration, study or report, or the results thereof, which evidence is represented, directly or by implication, as supporting, showing or proving the existence or nature of any fact or feature respecting such product when such evidence does not support, show or prove such fact or feature.

3. Making any statement or representation, directly or by implication, by reference to a test, survey, experiment, demonstration, study or report, unless such work has been designed, executed, and analyzed in a competent and reliable scientific manner and unless its purpose, content, validity, reliability, results, or the conclusions which may be drawn therefrom, are fairly and accurately represented.

Part V

It is further ordered, That respondent McCaffrey and McCall, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product, as defined in Part III of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order.

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials, or post purchase materials making such claim or representation were last disseminated. Such records will be made available to the Commission staff for inspection upon reasonable notice.

Part VI

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements or other product-related sales materials.

Part VII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Part VIII

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2755. Consent Order, Oct. 24, 1975—Modifying Order, March 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on Oct. 24, 1975 (86 F.T.C. 1002), by modifying Paragraph I(11), so as to allow the company to impose non-discriminatory standards on the kind of retailers its distributors and dealers can serve.

ORDER MODIFYING DECISION AND ORDER

The Commission on November 5, 1982 having reopened the order and issued an order against respondent to show cause why the consent order to cease and desist entered on October 24, 1975 should not be modified as set forth therein; and respondent thereafter having answered that it has no objection to modification of the consent order as set forth in the order to show cause;

Accordingly, *it is ordered* that Paragraph I(11) of the order in this matter is modified to read:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and nondiscriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2492. Consent Order, March 18, 1974—Modifying Order, March 9, 1983

This order reopens the proceeding and modifies the Commission's order issued on March 18, 1974 (83 F.T.C. 1374). The modification deletes the order's "fencing-in" provision, including the requirement that prohibited Occidental from preparing statistical data comparing its purchases from a company to its sales to that company, and vacates the order in its entirety 10 years after its March 1974 issue date.

REOPENING AND VACATING IN PART AND MODIFYING IN PART ORDER ISSUED MARCH 18, 1974

On November 8, 1982, respondent Occidental Petroleum Corporation ("Occidental") filed a "Request To Reopen And Vacate Or Modify Consent Order" ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Petition asks the Commission to reopen the consent order, issued on March 18, 1974 ("the Order"), and either: vacate the Order in its entirety; modify to limit the duration to a ten-year period; or modify "to bring it in line with current case law and enforcement attitudes."

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order at the request of a respondent upon a "satisfactory showing that changed conditions of law or fact require" modification. In addition, Section 5(b) provides that the Commission has discretion to modify orders whenever, in its opinion, the public interest requires.

After reviewing respondent's Petition, the Commission has concluded that respondent has not made a satisfactory showing that changed conditions of law or fact have occurred that require the modification or vacation of the Order. However, the Commission has determined that the public interest warrants modifying the pending Order in two respects.

First, a number of the Order's provisions are aimed at "fencing-in" respondent's future conduct. *See FTC* v. *National Lead Co.*, 352 U.S. 419 (1957). Although some of these provisions may have been justified at the time the Order was initially approved, their continued existence unnecessarily inhibits respondent from engaging in conduct which, in and of itself, is innocuous and may, in certain circum-

stances, be procompetitive. In addition, there no longer appears to be any need for continuing the "fencing-in" provisions of the Order. No adverse comments were received indicating any special need to retain them and the Commission has no reason to believe that the Order has or is being violated in any respect.

These same arguments support vacating the remaining provisions of the Order at the end of a ten year period. In certain cases, perpetual conduct orders are appropriate in order to insure that violations of Commission orders are subject to civil penalties rather than forcing the Commission to initiate proceedings *ab initio.* However, we have no evidence in this record that would support retaining the provisions of this Order in perpetuity.

Accordingly, *it is ordered* that Paragraphs I(f), (g), (h) and II of this Order be vacated at this time and the remaining provisions be vacated ten years from date of their initial entry, *i.e.,* March 18, 1974.

Commissioner Bailey voted in the affirmative as to elimination of the fencing-in provisions and in the negative as to sunsetting the Order. Commissioner Pertschuk voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I agree that the broad "fencing-in" provisions in the order are no longer necessary and should be narrowed to prohibit only anticompetitive reciprocal dealing. The Commission goes further, however, by terminating the order completely after ten years.

Our general policy in the past has been to issue perpetual conduct orders as to conduct which actually violates Section 5 unless there are persuasive reasons to create an exception. Here, however, the Commission appears to reverse that presumption by requiring "evidence in this record" supporting a perpetual order. It is not clear that the Commission is making a change in policy for future cases, but, in any event, I dissent from the result in this case.

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8899. Final Order, Oct. 1, 1974—Modifying Order, March 11, 1983

This order reopens the proceeding and modifies the Commission's order issued on Oct. 1, 1974 (84 F.T.C. 547). The modified order permits respondents to make claims that environmental surfaces play a significant role in the transmission of viruses and bacteria associated with colds and that household disinfectants can reduce the incidence or prevent the spread of colds, if supported by competent and reliable scientific evidence.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 20, 1982, Sterling Drug, Inc. and SSC&B, Inc., respondents in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered therein. By letter dated January 17, 1983, respondents agreed to modify their original proposal.

The consent order, which was issued in 1974, applies to Lysol or any other household disinfectant products. Sterling Drug manufactures and markets Lysol Brand Disinfectants. SSC&B prepared and distributed the advertising for Lysol Brand Disinfectants which was challenged in the complaint. The advertising represented that Lysol Brand Disinfectants could be used to kill influenza viruses and other germs and viruses on environmental surfaces and in the air, and that such use would be of significant medical benefit in reducing the incidence or preventing the spread of colds, influenza, and other upper respiratory diseases within the home. However, the prevailing view among scientists at the time the advertising was disseminated was that airborne germs and viruses were the known cause of most colds, influenza, and other upper respiratory diseases, that germs and viruses on environmental surfaces did not play a significant role in the transmission of colds, influenza, and other upper respiratory diseases, and that Lysol Brand Disinfectants would not be of medical benefit in reducing the incidence or preventing the spread of these diseases. Consequently, paragraphs I.A and I.B of the consent order prohibited the following claims:

A. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza, colds, or streptococcal throat infection;

B. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza, colds, or streptococcal throat infection.[1]

In their petition, respondents allege that there has been a dramatic change in scientific opinion since the order was issued in 1974 with respect to the manner in which colds are transmitted. Consequently, they request a change in those provisions of paragraphs I.A. and I.B. of the order which relate to colds.[2] The request, as set forth in the letter of January 17, 1983, is that those paragraphs be changed to prohibit the following claims:

A. 1. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza or streptococcal throat infection;

2. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds;

3. it has been established that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds, unless such representation is true.

B. 1. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza or streptococcal throat infection;

2. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use will be of medical benefit in reducing the incidence or preventing the spread of colds;

3. it has been established that use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless such representation is true.

Respondents presented impressive evidence indicating that most scientists no longer believe that "airborne germs and viruses are the known cause of most colds," as paragraph 9 of the complaint filed in

[1] The order also contains certain other provisions discussed below.

[2] In their petition, respondents also requested a change in order provisions relating to influenza and streptococcal throat infection. However, by letter dated January 17, 1983, they modified their request. As modified, the request does not seek a change in the existing prohibitions on claims relating to the role of environmental surfaces in the transmission of these diseases or the use of household disinfectants in reducing the incidence of preventing the spread of these diseases.

this matter indicates they did in 1974.[3] Rather, there is mounting scientific evidence that, at least for rhinoviruses (which are the major cause of colds in adults), hand contamination with virus and subsequent self-inoculation with the virus may be a more important route of infection than the airborne route.[4] Similar findings have been made for respiratory syncytial virus, the major cause of colds in children.

The evidence indicates that hands can become contaminated with virus in two ways—through contact with viruses on the skin of another person or through contact with viruses which have survived on environmental surfaces. Evidence has been presented which indicates that rhinoviruses can survive for as long as three or four days on environmental surfaces, and respiratory syncytial viruses for as long as six hours. The evidence indicates that most scientists are no longer certain that "germs and viruses on environmental surfaces do not play a significant role in the transmission of colds," although paragraph 9 of the complaint indicates they did believe this proposition in 1974.[5] Furthermore, while there is certainly controversy on the subject, some eminent scientists have taken the affirmative position that environmental surfaces probably do play some role in the transmission of colds.[6] Finally, while some scientists still support the statement set forth in paragraph 9 of the complaint that disinfectants "will not be of significant medical benefit in reducing the incidence or preventing the spread of colds," some eminent scientists have said that the use of disinfectants may be of benefit.[7]

Thus, we are presented with a change in scientific opinion with respect to issues on which the complaint and order in this matter were based. Most of these issues are now controversial, and there are reputable scientists on both sides of the controversy. We believe that an absolute ban on claims for which there may be reputable scientific support is inappropriate. On the other hand, we believe that such claims must not be made in such a way that they assert or imply that the propositions in question have been established to the satisfaction of the scientific community, unless such is the case.[8] Consequently, we

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[3] *See, Sterling Drug, Inc.*, 84 F.T.C. 547, 551 (1974).

[4] Indeed, the evidence indicates that experimenters have been unable to demonstrate that it is possible to transmit a rhinovirus cold via the airborne route.

[5] 84 F.T.C. at 551.

[6] *See, e.g.*, letter of December 2, 1982 to Ernst Zander, M.D. from R. Gordon Douglas, Jr., M.D., Professor and Chairman, Department of Medicine, New York Hospital-Cornell Medical Center; letter of Jan. 7, 1983 to Ernst Zander, M.D., from Robert B. Couch, M.D., Professor of Microbiology and Immunology and Medicine, Baylor College of Medicine. It should be noted that Doctors Douglas and Couch were both designated by complaint counsel as witnesses in the trial scheduled in 1973 for this matter. (Neither testified since the matter was settled before trial.) Both have obviously changed their opinions on the relevant issues since that time.

[7] *Id.*

[8] *See, e.g., American Home Products Corporation*, D.8918 (Sept. 9, 1981), *modified*, No. 81-2920 (3rd Cir. Dec. 3, 1982); *National Commission on Egg Nutrition*, 88 F.T.C. 89 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

have modified the order to allow claims that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds to be made if they are supported by competent and reliable scientific evidence. Similarly, we have modified the order to allow claims that the use of a household disinfectant will be of medical benefit in reducing the incidence or preventing the spread of colds to be made if they are supported by competent and reliable scientific evidence. However, claims that either of these propositions have been established can only be made if it is true that the propositions have been established.

In addition, in the letter of January 17, 1983, respondents have requested that we modify section I.D. of the order "for uniformity of language" with sections I.A. and I.B., as modified. Paragraph D, as presently written, prohibits any representation that

> D. use of any household disinfectant product kills germs associated with disease[s], unless such representation expressly mentions the name[s] of the disease[s]; the representation is true; and respondent[s] making such representation has [have] competent and reliable scientific evidence that such use reduces the incidence or prevents the spread of the named disease[s].

The change requires that a respondent can only make the claims listed in paragraph I.D. if it has and *relies on* competent and reliable scientific evidence for the claims. We believe this is a desirable change which will clarify the meaning of paragraph I.D. of the order.

Finally, respondents requested in their petition that paragraph I.E. of the order be modified to eliminate the requirement that any representation that "use of any household disinfectant kills viruses associated with influenza, colds, streptococcal infection, staphyloccal infection, or other respiratory diseases" must be accompanied by a statement that "there is no evidence that the product portrayed will protect the family against flu or strep throat." (This request is unchanged by the letter of January 17, 1983). Respondents point out that paragraph I.D. of the order guarantees that no representation that a product kills cold viruses will be made unless there is scientific evidence that the product is of benefit in preventing the spread or reducing the incidence of colds. Respondents contend that "[s]uch a well-founded and substantiated statement about *colds* would be confused, not clarified, by a disclaimer directed to other more serious diseases," and that the existing I.E. "would impose an unwarranted and confusing burden upon valid and useful statements reflecting the new scientific knowledge and opinion on colds." Petition, p.20. We agree that the disclosure required by I.E. is not necessary in advertisements relating only to colds. Consequently, we have modified I.E. so as to delete this requirement.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued October 1, 1974 in Docket No. 8899 is hereby modified to read as follows:

Order

I

It is ordered, That respondents Sterling Drug Inc., a corporation, and SSC&B, Inc., a corporation, their successors and assigns and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of Lysol Brand Products or any household disinfectant product, shall forthwith cease and desist from representing, directly or by implication, that:

A. 1. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with influenza or streptococcal throat infection;

2. environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds;

3. it has been established that environmental surfaces play a significant role in the transmission of viruses or bacteria associated with colds, unless such representation is true.

B. 1. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of influenza or streptococcal throat infection;

2. use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use will be of medical benefit in reducing the incidence or preventing the spread of colds.

3. it has been established that use of any household disinfectant product will be of medical benefit in reducing the incidence or preventing the spread of colds, unless such representation is true.

C. use of any household disinfectant product kills airborne viruses or bacteria associated with influenza, colds, streptococcal throat infection, or other upper respiratory disease, *provided,* that nothing in this

subparagraph shall be construed to otherwise restrain demonstrations of aerosol products as room deodorizers or air fresheners;

D. use of any household disinfectant product kills germs associated with disease[s], unless such representation expressly mentions the name[s] of the disease[s]; the representation is true; and respondent[s] making such representation has [have] and relies [rely] on competent and reliable scientific evidence that such use reduces the incidence or prevents the spread of the named disease[s];

E. use of any household disinfectant product kills viruses or bacteria associated with influenza, streptococcal infection, staphylococcal infection, or other upper respiratory diseases other than colds, unless the advertisement in which such representation appears clearly and conspicuously discloses that there is no evidence that the product portrayed will protect the family against flu or strep throat, *provided,* that nothing in this subparagraph shall be construed to apply to a representation that Lysol Brand Disinfectants kill bacteria which cause streptococcal or staphylococcal skin infections.

II

It is further ordered, That nothing herein contained shall be construed to require any alteration of, or deletion from the labeling of any of Sterling's household disinfectant products of legends, claims or information heretofore specifically accepted by the Environmental Protection Agency or its predecessor agency pursuant to the Federal Insecticide, Fungicide and Rodenticide Acts, as amended, 7 U.S.C. 135, *et seq.*

III

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondents forthwith distribute a copy of this order to each of its operating divisions or subsidiaries involved in the advertising, promotion, distribution or sale of Lysol Brand Disinfectants.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

SEPARATE STATEMENT OF CHAIRMAN JAMES C. MILLER III

I concur in the Commission's unanimous decision to modify the existing order in this matter and require a reasonable basis for Sterling's advertising claims for Lysol. Sterling will now be permitted to make truthful claims, subject to proper substantiation, that environmental surfaces can play a significant role in transmitting colds and that using a household disinfectant may reduce the incidence or prevent the spread of colds.

Sterling has presented to the Commission a significant amount of new scientific evidence on how cold viruses are spread. This evidence represents a change in the facts underlying the original order and forms the justification for the current modification. In 1974, when the Commission issued the original order, the prevailing view in the scientific community was that airborne germs and viruses were the primary cause of colds. Accordingly, the Commission prohibited any claims that environmental surfaces play a significant role in transmitting colds, and that using household disinfectants such as Lysol can help prevent colds.

Sterling's detailed petition indicates that, contrary to the Commission's premise in bringing this case, there is a substantial body of reputable scientific evidence indicating that environmental surfaces play a significant role in spreading colds. Indeed, at least two of the three experts on whom the Commission relied in bringing the case now support Sterling's position. Moreover, no one disputes that Lysol effectively cleans environmental surfaces. Although Sterling's evidence does not show, nor have they claimed, that spraying Lysol absolutely prevents colds, this should not preclude Sterling from making properly qualified, substantiated efficacy claims.

In moving from a total prohibition of certain claims to allowing those for which there is a reasonable basis, I believe the Commission is recognizing that Sterling currently has a reasonable basis for making some advertising claims concerning the product's effectiveness. If a majority of the Commission did not agree with this, it would have been more appropriate to deny the order modification. Of course, the Commission has not seen any specific advertising claims, and we will scrutinize any Sterling claim to be certain it is substantiated.

As with most medical and many other types of claims, absolute certainty is not feasible. The proper role of the Federal Trade Commission is not to ban all claims unless they can be shown to be true beyond a shadow of a doubt,[1] but to weigh the costs and benefits of

[1] As the Commission indicated in *Pfizer*, 81 F.T.C. 23, 64 (1972), the amount of testing necessary to support a claim depends on the circumstances, including the type of claims, the cost of obtaining the supporting evidence, and the possible consequences of a false claim. Particularly given Commissioner Pertschuk's description of the testing procedure here, obtaining empirical evidence of absolute proof of efficacy would be far more costly than the attendant risks and benefits warrant.

allowing or banning the dissemination of information about which some uncertainty may exist. Here, if the Commission allows claims for which there is a reasonable basis and they are later determined to be false, consumers are injured only to the extent of the cost of their Lysol purchases.[2] If the Commission bans the claims and they turn out to be *true,* consumers will be prevented from learning of an effective method to reduce the incidence and spread of colds, America's most prevalent disease.

Sterling has made a strong showing that its theory of how colds are spread is valid, and that the Commission's theory in bringing this case is not. Sterling has also provided evidence that Lysol kills cold viruses. Therefore, Sterling should be permitted to make adequately substantiated claims at least on these two points. Prohibiting such claims, as Commissioner Pertschuk apparently prefers (although he supported the change) would not strengthen the advertising substantiation doctrine. It would instead deprive consumers of valuable, truthful information.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

Sterling wants out of a 1974 consent order which prohibits it from claiming that spray Lysol can prevent colds. It says that it now has proof that, contrary to prior scientific understanding, cold viruses can be picked up from environmental surfaces and that Lysol can help prevent colds by killing surface viruses. It now seeks to modify the order to permit it to claim that Lysol can help prevent colds.

I have reluctantly voted in favor of the order modification, simply because the only alternative under consideration by a majority of the Commission would have eroded the advertising substantiation doctrine even further. At the very least, Sterling is cautioned by the Commission letter accompanying the modified order that the modification in no way indicates that Sterling in fact presently has a "reasonable basis" for any claim, express or implied, that Lysol actually prevents colds.

The Commission's concern (however mildly expressed in the letter) is well-founded. The primary piece of evidence which Sterling cites is a study, partly funded by Sterling, conducted by two eminent scientists at the University of Virginia. They directed volunteers with colds to blow their noses on their hands and wipe them on some plastic tiles. Ten minutes later, some tiles were given a three second shot of Lysol; others were not. After fifteen minutes, healthy volunteers were directed to rub their fingers on the tiles, and then pick their noses and rub their eyes. Lo and behold, about half of the healthy volunteers

[2] Because the product has other values, the expenditures will not be totally wasted for many consumers.

touching the untreated tiles got colds; fewer got colds from touching the tiles that had been sprayed with Lysol, although the results were not statistically significant.

Largely on the basis of this laboratory evidence, demonstrating simply that Lysol killed cold viruses on surfaces that otherwise might be transmitted to people, at least some scientists are now of the opinion that Lysol "may" be of value in reducing colds in the home environment, on the logical assumption that a reduction in the number of viruses will lead to a reduction in colds. Most scientists, however, remain skeptical. They note that, while Lysol might work in *theory,* there's just no *proof* that in fact it does—and reason to think it doesn't. Laboratory results might well be meaningless in the home environment, which is, of course, the only environment consumers care about. (After all, any family that duplicates the bizarre laboratory procedure described above in its own home needs more than a shot of Lysol to solve its problems.) Practical constraints that exist in home environments limit the applicability of the findings. For example, household surfaces are continually being re-infected. Many surfaces which harbor viruses—like skin and clothing—can't be safely sprayed. And perhaps more fundamentally, scientists just don't know the *significance* of the role of surface contamination. Assigning a family member the chore of spraying doorknobs and telephones every ten minutes just isn't likely to be of much help when other sources of cold viruses—such as direct contact with people with colds—may be even more likely to cause colds.

The modified order would require Sterling to prove that an unqualified medical efficacy claim, such as "Lysol reduces the incidence of colds," is in fact recognized by the scientific community to be an established fact. The effect of this standard is properly to prohibit such claims, since it is evident that there is simply no proof that Lysol works to reduce colds. All that Sterling has is an unproved theory.

Nevertheless, apparently motivated by the belief that *all* information has inherent value, the Commission has modified the Order to permit Lysol to make certain "qualified" claims, as long as those claims are supported by "competent and reliable scientific evidence" —in other words, a reasonable basis. In my opinion, the only claim for which Sterling has a reasonable basis goes something like this: "While many scientists disagree, some scientists are of the opinion that in certain circumstances, Lysol may, with an unknown probability, reduce the incidence of colds to an unknown extent in a home environment."

The mischief with this elegant formulation is that the only claims which Sterling is actually likely to make in a typical 30-second television ad will fall far short of giving consumers the complete context

they need to properly interpret the claim. After all, Sterling isn't interested in making these claims to educate the public to the possible health hazards of cold viruses harboring on doorknobs and countertops. It wants to make them to sell more Lysol.

Simply put, any "qualified" claim Sterling is likely to make by permission of the revised order must invariably make an implied claim that Lysol reduces colds—precisely the claim for which Sterling lacks proof. As a result, such "qualified" claims have a capacity to mislead which far outweighs their capacity to inform. For that reason, I would have preferred to retain the existing prohibitions on making even qualified claims. As an alternative, I would have been willing to support these modifications with a letter that plainly stated that Sterling presently does not have a reasonable basis for any claim, express or implied, that Lysol reduces colds.

I would note, however, that even under the modified order, the burden will be on Sterling to make sure that their "qualified" claims do not make an implied claim that Lysol reduces the incidence of colds. To that end, Sterling would be well-advised, to the extent that it wishes to avoid making any implied efficacy claims when it makes the qualified claims permitted by the order modification, to disclose that Lysol has not been proven to reduce colds in actual home settings.

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC.

Docket 9149. Interlocutory Order, March 11, 1983

ORDER ON RESPONDENT'S APPLICATION FOR INTERLOCUTORY REVIEW

It has long been the Commission's policy to provide to the respondents in its administrative proceedings copies of all prior statements of complaint counsel's witnesses, for use in cross-examination. *Inter-State Builders, Inc.*, 69 F.T.C. 1152 (1966); *Ernest Mark High*, 56 F.T.C. 625 (1959). While the Commission is not bound by the Jencks Act, 18 U.S.C. 3500, or compelled to adhere to its principles, it does look to court decisions interpreting it for guidance in enforcing its own policy. *USLife Credit Corp.*, 91 F.T.C. 984, 1036–37 (1978).

On April 30, 1979, the Federal Rules of Criminal Procedure were amended, effective December 1, 1980, to require the production of "Jencks-type" prior statements of *all* witnesses (except the defendant) in criminal trials, on motion of the opposing party. Fed.R.Crim.P. 26.2(a), 18 U.S.C. Rule 26.2 (1982 Supp.). On July 5, 1982, the trial in this proceeding began. On July 30, 1982, complaint counsel moved for an order directing respondent to produce Jencks-type statements of its witnesses, consistent with the amended Rules. The Administrative Law Judge ("ALJ") concluded on August 19, 1982, that the circumstances of this particular case justified an order for the production of such statements by respondent's *expert* witnesses. On September 15, 1982, respondent applied for review of the order, and on October 21 the ALJ certified the review to the Commission under Section 3.23(b) of the Commission's Rules of Practice, 16 U.S.C. 3.23(b), as involving a controlling question of policy as to which there is substantial ground for differences of opinion. The ALJ further concluded that immediate appeal may materially advance the ultimate disposition of the litigation. The trial continued, with respondent tendering all required statements of its expert witnesses, subject to an agreement that this would not be deemed a waiver of respondent's rights to pursue its appeal. On December 17, 1982, respondent completed the presentation of its witnesses.

The Commission has determined to grant review of the order because it presents a controlling question of policy on which the Commission has as yet provided no guidance, and there is substantial ground for differing views. Furthermore, resolution of the question will facilitate the ultimate resolution of this case.

In establishing the defendant's right to examine and use in cross-

examination the prior statements of government witnesses in federal criminal prosecutions, the Supreme Court emphasized the value of eyewitness accounts, and particularly contemporaneous eyewitness accounts, of events in controversy: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States,* 353 U.S. 657, 667 (1956). Similarly, in upholding a trial judge's order that the report of an investigator for the defendant be revealed to the prosecution for use in the cross-examination of the investigator, the Court reasoned that his contemporaneous report of eyewitness' accounts of an armed robbery "might provide critical insight into the issues of credibility that the investigator's testimony would raise." *United States* v. *Nobles,* 422 U.S. 225, 232 (1975). The Jencks Act and revised Rule 26.2 were adopted to clarify and circumscribe the authority of the federal judiciary to exercise their inherent power, recognized in the *Jencks* and *Nobles* decisions, to enhance the truth-finding process in criminal proceedings by ordering the discovery of witnesses' prior statements. *Palermo* v. *United States,* 360 U.S. 343 (1959); Notes of Advisory Committee on Rules, 18 U.S.C. Rule 26.2 (1982 Supp.).

The Commission has concluded that it is unnecessary to adopt the principle of Rule 26.2 to assure adequate cross-examination of expert witnesses in its proceedings, even assuming *arguendo* that the need to uncover prior inconsistent statements of witnesses is as compelling in such proceedings as it is in criminal trials. The Commission's Rules of Practice already provide for extensive discovery concerning expert witnesses. Section 3.31(b)(4)(i) provides that discovery of facts known and opinions held by expert witnesses may be obtained as follows:

> (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

This section is nearly identical to Rule 26(b)(4) of the Federal Rules of Civil Procedure.[1]

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[1] Rule 26(b)(4) provides:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other

(footnote cont'd)

There is a division among the courts as to the appropriate scope of discovery under subsection (b)(4)(a)(ii) of Rule 26, which is analogous to subsection 3.31(b)(4)(i)(B) of the Commission's Rules. It has been held that in order to obtain "further discovery" beyond interrogatories under this subsection (specifically, in these cases, copies of reports written by experts), the moving party must show "unique or exceptional circumstances"[2] or a "compelling" need for such discovery.[3] One court has explicitly incorporated into subsection (b)(4)(a)(ii) the "substantial need" standard contained in Rule 26(b)(3)—the analog to Section 3.31(b)(3) of the Commission's Rules—in considering a discovery request for documents prepared by an expert in anticipation of litigation.[4] However, the prevailing view is more liberal: further discovery should be granted when a request is reasonably framed to enable the movant to prepare for effective cross-examination of the expert or rebuttal.[5]

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party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

[2] *Breedlove* v. *Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). The decision here may have turned on the fact that discovery of the witnesses' reports was requested before discovery under subsection (b)(4)(a)(i) had been completed. The courts have uniformly agreed that Rule 26 establishes a two-step process for discovery regarding expert witnesses. *E.g., Shackelford* v. *Vermeer Mfg. Co.*, 93 FRD 512 (W.D. Texas 1982); *United States* v. *Int'l Business Machines Corp.*, 72 FRD 78 (S.D.N.Y. 1976); *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 65 FRD 528 (D. Conn. 1975); *United States* v. *John R.—Piquette Corp.*, 52 FRD 370, 372 (E.D. Mich. 1971).

[3] *United States* v. *145.31 Acres of Land*, 54 FRD 359, 360 (M.D. Pa. 1972).

[4] *Wilson* v. *Resnick*, 51 FRD 510 (E.D. Pa. 1970). The court also applied the standard of Rule 26(b)(3) in evaluating the discoverability of experts' reports in *Breedlove* v. *Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). However, it is not clear that the court considered that standard to be incorporated into 26(b)(4)(a)(ii); it may have (erroneously) considered 26(b)(3) to offer an alternative ground for discovery of the reports.

The approach in *Resnick* has been criticized as "interject[ing] the work-product doctrine into an area of discovery in which the Advisory Committee [to the Rules of Civil Procedure] explicitly rejected the doctrine." Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U.Ill.L.F. 895, 927. This approach has also been defended as logical, if the expert has taken on a consulting role in the litigation. Comment, Discovery of Expert Information Under the Federal Rules, 10 U.Rich.L.Rev. 706, 719–21 (1976). *See also*, Connors, A New Look at an Old Concern—Protecting Expert Information From Discovery Under the Federal Rules, 18 Dusquesne L.Rev. 271 (1980).

[5] *Sea Colony West Phase I Condominium Ass'n* v. *Sea Colony, Inc.*, 438 A.2d 1233 (Super. Ct. Del. 1981) (decided under state court rules, but relying on the Advisory Committee Note on the Federal Rules and the federal case law on Rule 26(b)(4)(a)(ii)); *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 77 FRD 39 (N.D. Cal. 1977); *Quadrini* v. *Sikorsky Aircraft Div., United Aircraft Corp.*, 74 FRD 594 (D. Conn. 1977). In *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 65 FRD 528, 530 (D. Conn. 1975), the court went so far as to conclude that "[o]nce the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness." Unlike the other cases, *Herbst* concerned a request for deposition rather than the production of a report prepared by an expert. In another case involving requests for both reports and depositions, the court expressed the view that Rule 26(b)(4) provides for "quite liberal" discovery of the opinions of experts; however, the court did not reveal specifically what test it would apply in evaluating requests under (a)(ii) after discovery under (a)(i) was completed. *United States* v. *John R.—Piquette Corp.*, 52 FRD 370 (E.D. Mich. 1971).

In addition to these reported cases, a survey of federal district judges, magistrates, government attorneys, and private practitioners indicates that:

> the actual practice of discovery of expert witnesses expected to be called at trial varies widely from the two-step procedure of Rule 26(b)(4)(A). The interrogatory overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal. In practice, full discovery is the rule, and practitioners use all available means of disclosure including both the discovery of expert's reports and depositions.

(footnote cont'd)

The Advisory Committee to the Rules of Civil Procedure did not expressly explain how "further discovery" should be evaluated. However, the Committee emphasized in its Explanatory Statement that "[e]ffective cross-examination of an expert witness requires advance preparation. * * * Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side." On the other hand, the Committee recognized the fear, reflected in the caselaw, that "one side will benefit unduly from the other's better preparation," and it advised that the procedure it recommended would minimize the risk of that happening:

> Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.
>
> Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse.

Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 503–04 (1970). This suggests that "the primary purpose of this subsection is to permit the opposing party to prepare an effective cross-examination" and, further, that discovery should be granted when the court is persuaded that "the party seeking discovery is not abusing the procedure and the information sought would prove helpful in providing for a full and fair adjudication."[6]

Thus, the Commission has concluded that the more liberal view of discovery of experts under the Federal Rules is the one that should apply in Commission adjudications.[7] It is most consistent with the desire of the Commission in 1978 to "balance a somewhat broadened range of discovery with firm control by Administrative Law Judges of the pace and scope of adjudicative proceedings." 43 FR 56862 (1978).

Accordingly, it is already well within the broad discretion of the

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Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal, 1977 U.Ill.L.F. 169, 172. The author recommends that Rule 26(b)(4) be amended to provide "full discovery" to prepare for cross-examination and rebuttal, "to comport with actual practice and with the intentions of the drafters of the Federal Rules of Evidence." *Id.* at 202.

[6] *Sea Colony West Phase I Condominium Ass'n* v. *Sea Colony, Inc.*, 438 A.2d 1233, 1235 (Super. Ct. Del. 1981). *See also* discussions of the Explanatory Statement in the *IBM* and *Herbst* cases cited in note 5; Graham, supra note 4, at 921–927; and 8 C. Wright & A. Miller, Federal Practice and Procedure Section 2031 (1970).

[7] When the Commission revised its discovery rules in 1978 and adopted Section 3.31(b)(4)(i) in its current form, it explained how judicial interpretations of the Federal Rules would influence the application of its own rules:

> Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission's rules must be tailored to the circumstances of Commission proceedings.

43 FR 56862, 56863 (1978).

Administrative Law Judges to order the disclosure of prior statements of expert witnesses such as those described in the Jencks Act.[8] This being the case, it is unnecessary to transplant to civil administrative proceedings procedures that have been developed for criminal litigation.

Although the ALJ did not reach his decision here under Section 3.31(b)(4)(i)(B), his analysis was appropriate for a determination under that rule. Clearly, it was his judgment from reviewing the summaries of anticipated testimony that effective cross-examination of expert witnesses could be critical to a proper resolution of this case, and that the disclosure of prior statements of those witnesses could allow for more effective cross-examination than would otherwise be possible. An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse. *General Foods Corp.*, 95 F.T.C. 306 (1980); *Warner-Lambert Co.*, 83 F.T.C. 485 (1973); *Boise Cascade Corp.*, Docket No. 9133 (order of Oct. 15, 1982) [100 F.T.C. 512]. Since his order is sustainable under Section 3.31(b)(4)(i)(B), respondent's motion that it be reversed is hereby denied.

[8] *See, e.g., Xidex Corp.*, Docket No. 9146, (order of Aug. 27, 1981).

IN THE MATTER OF

MEREDITH CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3107. Complaint, March 15, 1983—Decision, March 15, 1983

This consent order requires a Des Moines, Iowa franchisor and operator of the Better Homes and Gardens Real Estate Service (Service), among other things, to cease making false or misleading representations regarding the Service, its members, or services offered. The order prohibits the dissemination of advertisements and promotional materials which represent that all Service members offer consumers "settling-in" services; participate in a home-building program; and offer "exclusive" home-protection insurance, unless the advertisement clearly discloses that not all members offer these services. The corporation is also barred from making unsubstantiated representations concerning the Service's selectivity in choosing members; training of sales associates of Service members; market size, rank and leadership in terms of sales volume of Service members; or any statement which compares Service members to other real estate franchisors as to calibre of members or membership standards. Further, respondent must send to all members of the Better Homes and Gardens Real Estate Service a letter recalling certain advertising and promotional materials, and an acknowledgement form.

Appearances

For the Commission: *Andrew B. Sacks* and *Matthew L. Myers.*

For the respondent: *Perry Bradshaw,* Des Moines, Iowa and *William Cerillo, McDermott, Will & Emery,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Meredith Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Meredith Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its office and principal place of business located at 1716 Locust Street, Des Moines, Iowa.

Better Homes and Gardens Real Estate Service ("respondent's real estate service") is an operating group of Meredith Corporation.

PAR. 2. Respondent is now and at all times relevant to this complaint has been engaged in the operation of a network of independently owned real estate agencies, under the title Better Homes and Gardens Real Estate Service. Individual real estate firms join Better Homes and Gardens Real Estate Service as franchise members by signing a franchise agreement and paying specified fees to the service.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising referred to herein, to promote consumer use of real estate firms which are members of Better Homes and Gardens Real Estate Service, and to promote real estate firms' joining that service.

PAR. 4. Respondent's operation of Better Homes and Gardens Real Estate Service at all times mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent's members at all times mentioned herein have been and now are in competition with individuals, firms, and corporations engaged in the sale of real estate.

PAR. 6. In the course and conduct of its business, and for the purpose of promoting consumer utilization of real estate firms which belong to Better Homes and Gardens Real Estate Service, respondent has disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and in television and radio broadcasts transmitted by television and radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical statements and representations in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits, A, B, C, D, E, F, G, and H.

PAR. 8. Through the use of the statements and representations referred to in Paragraph Seven, and other representations contained in advertisements not specifically set forth herein, respondent has represented, directly or by implication, the following claims concerning member participation in respondent's programs.

(a) All respondent's real estate service members offer consumers "settling-in" services.

(b) All respondent's real estate service members participate in a home-building program.

(c) All respondent's real estate service members offer consumers a home-protection insurance plan, in states where it is legal to do so.

(d) The home-protection plan offered by respondent's real estate service members is "exclusive".

PAR. 9. In fact, not all members offer the services referred to in Paragraph Eight (a), (b), and (c) above. Offering the services referred to in subparagraphs (a) through (c) of Paragraph Eight is optional for respondent's real estate service members, and those services can only be offered to consumers by a member if the member participates in the program.

In addition, the home-protection insurance plan referred to in Paragraph Eight (d) offered by some of respondent's members is not exclusive, but rather, comparable home-protection insurance is available from other sources.

PAR. 10. Through the use of the statements and representations referred to in Paragraph Seven, and other statements and representations contained in advertisements not specifically set forth herein, respondent has represented, directly or by implication the following claims concerning respondent's real estate service's selectivity in choosing members:

(a) Included in the selection process for all prospective members is screening based on: the prospective firm's training programs for its sales associates; the excellence in training of sales associates employed by the prospective member; and the firm's ability to obtain financing for consumers.

(b) Respondent's real estate service received over 18,000 "inquiries" from prospective members, and only one out of every seventy-two "inquiries" or "applicants" is "good enough" to become, or only one out of every 72 "inquiries" or "applicants" did become a member of respondent's real estate service.

PAR. 11. In fact,

(a) Screening of prospective members based on the prospective members' training programs for sales associates, the excellence in training of sales associates, and the firms' ability to obtain financing, is not conducted for a number of members before they are selected.

(b) (1) Respondent has not received 18,000 inquiries from prospective members; the actual number of inquiries received is significantly smaller than 18,000. The formula utilized by respondent's real estate service in calculating this figure was inadequate to yield an accurate result, and did not yield an accurate result.

(2) The ratio of prospective firms accepted by respondent or good

enough to become respondent members to "inquiries" or "applicants" from prospective firms is not one out of every seventy-two, but in fact is significantly smaller. The formula by which respondent's real estate service calculated this ratio was inadequate to yield an accurate result, and did not yield an accurate result.

PAR. 12. Through the use of the statements and representations referred to in Paragraph Seven, and other representations contained in advertisements not specifically set forth herein, respondent has represented that all of its members are market leaders in terms of sales volume in their respective markets.

PAR. 13. In fact, not all members are among the leaders in their respective communities in terms of sales volume.

PAR. 14. Through the use of the statements and representations referred to in Paragraph Seven, and other statements and representations contained in advertisements not specifically set forth herein, respondent has represented directly or by implication, that the sales associates of all of its members receive advanced training in addition to the basic training required to obtain a real estate license.

PAR. 15. In fact, respondent's real estate service provides training to sales associates of members only if the members purchase such training from the service and not all members have purchased such advanced training. Further, a number of sales associates of respondent's real estate service members have not received any advanced training from other sources.

PAR. 16. As the representations referred to in Paragraphs Eight, Ten, Twelve, and Fourteen are contrary to fact, such representations are false, deceptive or unfair, and, therefore, constituted unfair or deceptive acts or practices.

PAR. 17. At the time respondents made the representations alleged in Paragraphs Eight, Ten, Twelve, and Fourteen, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted unfair or deceptive acts or practices.

PAR. 18. Through the use of the advertisements referred to in Paragraph Seven, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Eight, Ten, Twelve, and Fourteen at the time of the representations' initial dissemination and each subsequent dissemination. In fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted unfair or deceptive acts or practices.

PAR. 19. The use by respondent of the aforesaid false, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have the capacity and tendency to mislead a substantial number of consumers into the erroneous and mistaken belief that said statements and representations are true and complete, and to induce such persons to utilize real estate firms which belong to Better Homes and Gardens Real Estate Service by reason of this erroneous and mistaken belief.

PAR. 20. The aforesaid acts or practices of respondent, herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

OUT OF EVERY 72 INQUIRIES, ONLY ONE MAKES IT AS A BETTER HOMES AND GARDENS™ REAL ESTATE SERVICE MEMBER.

YOU SHOULD BE SO PARTICULAR.

When we share the Better Homes and Gardens® name with someone, we are very particular.

We set the highest standards for our real estate members. And we ask tough questions about business reputation, successful track record, size and leadership, aggressive promotion, excellence in sales training, finance. The quality of the member is more important to us than pushpins on a map.

Out of 18,000 inquiries, only a few hundred...one out of 72...become Better Homes and Gardens® members.

It's as simple as this. People have come to expect quality when they see the Better Homes and Gardens® name.

So go with the sign that has two names you can trust: Better Homes and Gardens® and our real estate leader in your community.

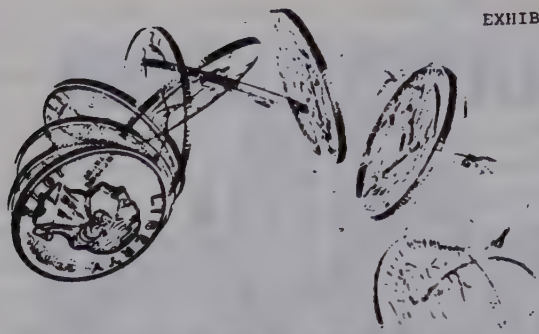
THE REAL ESTATE MEMBERS OF

Better Homes and Gardens

For relocation service call:
1-800-247-5050
(In Iowa call: 1-800-532-1430)

*Each Member an Independent Broker

EXHIBIT B



THE WAY A LOT OF AMERICANS SELECT A REAL ESTATE PERSON IS SHOCKING.

They don't select at all. They guess. Or start working with the first real estate person they meet and guess it will be all right.

They guess all real estate people are pretty much the same. That's too bad. They're not. And a bad guess can mean thousands of dollars. Or a slow sale. Or no sale.

Here's how Better Homes and Gardens® selects real estate firms as members.

We look for a leader in the market.

We look for firms that promote aggressively and take the time to train their sales associates.

We look into business reputation, ethics, and the ability to help buyers get financing.

We look so carefully, in fact, that only a few hundred...one out of 72...are good enough to become Better Homes and Gardens® Real Estate Service Members.

The point is this: if Better Homes and Gardens® takes such care in selecting member firms, you might do well to select one of our members.

So go with the sign that has two names you can trust: Better Homes and Gardens and our real estate leader in your community.

For relocation service call:
1-800-247-5050
(In Iowa call: 1-800-532-1430)

An association of independent brokers

Campbell-Mithun
Southdale Center, Minneapolis · 55402
ADVERTISING

MC: 0031
Apprvd By:

EXHIBIT C

Client/Prod: BETTER HOMES AND GARDENS REAL ESTATE SERVICE

Code No/Title: QMBY0061 - Crowd/Roy Wheeler Associates

Length: :10
LIVE ANNOUNCER

Mkt/Station: Charlottesville

Air Date:

			LIVE ANNCR:
1.	LONG SHOT OF CROWD	1.	Of every 72 who apply ...
2.	ALL BUT SPOKESMAN TURN SO BACKS FACE CAMERA	2.	only one makes it as a Better Homes and Gardens Real Estate Member. In the Charlottesville area
3.	LOGO: ROY WHEELER ASSOCIATES.	3.	that one is Roy Wheeler Associates.

12/1/80 dmo

EXHIBIT D

He seemed like a nice guy and your cousin knew him in college so you picked him to sell your house.

That's not a very good reason to trust someone with one of your most important investments. But that seems to be reason enough for a lot of Americans. For some reason, they assume that all real estate people are pretty much alike.

This is more than a bad assumption. It's a notion that can cost a home seller thousands of dollars . . . or a slow sale . . . or no sale.

Discover the vast difference between the quality, competence and professionalism of various real estate people — **ask some very tough questions.**

Seven Tough Questions You Should Ask Before You Select A Real Estate Person To Sell Your House:

1 Are they part of a strong national referral system?

If so, it means instant access to buyers moving from cities all across the country. The names generated through a national referral system often are people transferred by their companies and are excellent prospects. Usually they already have equity from the sales of a previous home — they're buyers, not lookers.

2 Do they keep up with the availability of home financing?

There's no sale if the buyer can't get mortgage money. Leading real estate firms understand your needs and know how to find financing for home buyers when conventional mortgages are unattractive. Loan assumptions, second mortgages, refinancing, contract for deed . . . are just a few of the financing options they can suggest. And in these days of a fluctuating money market, knowing what's available and how to get financing is important for a quick sale.

3 How many homes do they have listed for sale?

The real estate firm with a lot of listings means a high volume of business activity. You won't get lost in the shuffle. Rather, it means that more sales people are working on your behalf with many qualified buyers. Simply stated, the people with the listings usually get the buyer you want.

4 Will they make accurate home value estimates?

A critical factor. After all, how much you expect to get from your home is the basic reason for selling it. A value set too high means ultimate disappointment. A value set too low is even worse: it means you lose money. It's not always easy to accept . . . but a good firm will set a realistic selling price for your home. And that's what you should expect.

Better Homes and Gardens® Real Estate Service

5 Are their sales people well-trained?

Training makes a difference. A well-trained real estate person knows how to consider all factors when establishing a selling price for your home. They know zoning, taxes, and finance requirements of lending institutions. A person with this kind of ongoing training means a smooth, quick sale at a fair price. And a good real estate company takes the time and money to train its people.

6 Do they advertise and promote homes aggressively?

A few lines in the classified ads of the newspaper alone will not sell your home. Good real estate firms actively promote and advertise on a regular basis in a variety of media. They promote themselves. They promote your home. And this promotes business and traffic that makes a house sell faster. The best firm won't put your home on the market, they'll market your home.

7 Are they a leader in the market?

It's not that any size real estate firm can't be good and professional. They can. But there's usually only one reason a leader becomes a leader . . . by successfully matching up homes and people. It's a good sign when you're with a firm with a track record of success.

So go ahead. Ask. Selling a home is serious business and it pays to ask tough questions. We know. Because if we weren't tough enough to stand up to these questions, we couldn't be a Better Homes and Gardens® Real Estate Service member.

EXHIBIT E

Campbell-Mithun, Inc. ADVERTISING

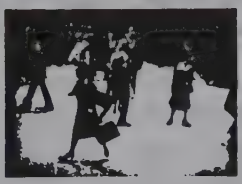
CLIENT: Better Homes & Gardens-Real Estate Service
PRODUCT: Real Estate Services
CODE NO./TITLE: QMBY8092/"Crowd/Financing"
JOB NO.: 0-192-103 DATE: June, 1980 LENGTH: :30

1. Before you select a real estate firm, you ought to ask some important questions.

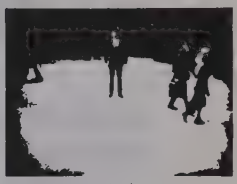
2. Can they help you with financing alternatives?

3. Are they a part of a respected national organization?

4. Do they have a strong relocation service?



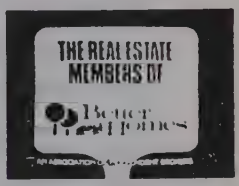
5. Do they have exclusive Settling-In Services to help you after the sale?



6. Go ahead and ask.

7. Because if a real estate firm can't stand up to all of these questions...

8. ...it can't be a Better Homes and Gardens member.



9. Go ahead. Ask.

EXHIBIT F

Put 56 years of trust right in your front yard.

Now the magazine that has earned the trust of millions of American families since 1922 can help when you sell or buy a home. The Better Homes and Gardens™ Real Estate Service is a natural extension of the trust and confidence we've established through decades of service to homeowners.

You'll find our sign displayed by leading real estate professionals across the country. We carefully choose these firms for their integrity, for their business reputation, for their record of client satisfaction.

Help when you sell

When you offer your home through a member of the Better Homes and Gardens™ Real Estate Service, you can count on reaching a large market of qualified buyers. You'll be served by a firm that has advanced real estate education programs. And information sources directly from Better Homes and Gardens. Even a Home Protection Plan,™ subject to state regulation, which provides protection against unexpected replacement or repairs for specified systems or appliances in your home.

Help when you buy

If you're looking for a new home within the same community, your Better Homes and Gardens™ Real Estate Service member can offer a complete selection of styles, prices and locations. If you're planning a longer move, our national Relocation Service will put you in touch with real estate professionals in the community where you're moving. They'll provide you with advance information on homes which fit your needs and budget, as well as vital information on your new community.

Two names you can trust

The Better Homes and Gardens™ Real Estate Service gives you two names you can trust. Ours and the name of the firm selected in your community. To identify our member closest to you, or in your new community, call this toll-free number:

1-800-247-5050

In Iowa, call 1-800-532-1430

Better Homes and Gardens™
Real Estate Service

Locust at 17th, Des Moines, Iowa 50336

Already more than 500 offices, each member independently owned.

EXHIBIT G

Fultz, LoCasse & Associates, Inc. / Advertising 6/27/79 pj Revised
Offices: Des Moines / Dubuque revised 6/21/79 CW-sr

CLIENT BH&G RES DATE 6/19/79 MRL/pj

JOB NUMBER 88-27-79

COPY FOR: :60 Radio: Paul Harvey ABC Network News

FOR BROADCAST JULY 16, 1979

PAUL HARVEY:

When you have a trusted name like "Better Homes and Gardens"...a name you've developed and protected for 57 years as a source of reliable information on housing...well, you just don't share it loosely. That's why the Better Homes and Gardens name means so many positive, good things when you see it teamed up with the name of a real estate firm in your own community. The Better Homes and Gardens Real Estate Service...yes, I said Real Estate Service...is an association of independent real estate brokers. Member firms are selected--they just don't sign up--they are selected for their own high standards of professional service. As a member of the Real Estate Service, your local Better Homes and Gardens broker can offer many exclusive programs...such as the Home Protection Plan, a national relocation service, exclusive building programs and much more. So, if you're buying or selling a home, look for the sign of "two names you can trust"...Better Homes and Gardens...and their member firm in your community.

EXHIBIT H

Radio

"GOOD SELECTION" 60 SECONDS

ANNCR: If you were selling your home within the next three years - and the records say one-third of you will be doing just that - how would you pick a real estate firm to help you? On the basis of a nice smile or the recommendation of a friend of a friend, or maybe they went to school with your cousin. Don't laugh - most Americans select a real estate company for no better reasons than these and that just doesn't make sense. The purchase or sale of a home is the most important single financial transaction most people ever make. And the differences between real estate people can mean a difference of thousands of dollars - or a home that sells quickly or sits on the market. Alright, here's how Better Homes and Gardens® selects their own real estate members. Track record - are they a successful real estate company? Business reputation - do they have the highest standards of integrity? Imagination - do they take the time to understand a home and market that home creatively? In fact, far more firms have applied to become a Better Homes and Gardens® Real Estate Service member than have been accepted. Conclusion? Obvious! A Better Homes and Gardens member is a good selection. Each member an Independent Broker.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Meredith Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 1716 Locust Street, in the City of Des Moines, State of Iowa.

Respondents are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Meredith Corporation ("Meredith"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising and promotional materials for Better Homes and Gardens Real Estate Service ("Respondent's real estate service"), in or affecting "commerce" as defined in the FTC Act, do forthwith cease and desist from making the statements or representations, directly or by implication, listed below, contrary to fact at the time of their dissemination:

(A) The following statements or representations concerning services offered consumers by respondent's real estate service members:

1. All respondent's real estate service members offer consumers "settling-in" services.
2. All respondent's real estate service members participate in a home-building program, and offer this program to consumers.
3. All respondent's real estate service members offer consumers a home-protection insurance plan, in states where it is legal to do so.
4. The home-protection plan offered by respondent's real estate service members is "exclusive," *provided,* that, for purposes of this order, a representation, direct or indirect, that a home-protection plan is exclusive shall mean that home-protection insurance providing comparable coverage is not available from other sources.
5. Any statements or representations that settling-in services, the home-building program, or the home-protection plan are offered to consumers by respondent's real estate service members, unless it is clearly and prominently disclosed within the advertisement where the representation appears that not all members offer the services. Such disclosure shall be in close proximity to the representation or noted by an asterisk to the representation referring to the disclosure.

(B) The following statements or representations concerning respondent's real estate service selection of members.

1. Included in the selection process for all prospective members is screening based on: the prospective firm's training programs for its sales associates employed by the prospective member; the excellence in training of sales associates employed by the prospective member; or the firm's ability to obtain financing for consumers.
2. Respondent's real estate service received over 18,000 "inquiries" from prospective members.

3. Only one out of every seventy-two "inquiries" or "applicants" is "good enough" to become, or only one out of 72 "inquiries" or "applicants" did become a member of respondent's real estate service.

(C) That all members of respondent's real estate service are "market leaders" in terms of sales volume in their respective communities.

(D) That the sales associates of members of respondent's real estate service all receive training in addition to the basic training required to retain a real estate license.

II

(A) *It is further ordered,* That Meredith, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising and promotional materials, for Better Homes and Gardens Real Estate Service, an operating group of Meredith Corporation, in or affecting commerce as defined in the Federal Trade Commission Act, do forthwith cease and desist from making any statements or representations, directly or by implication, concerning: programs offered by respondent's real estate service members; respondent's real estate service's selection process or selectivity in choosing members; market size, market rank, or market leadership in terms of sales volume of respondent's real estate service members; training of sales associates of respondent's real estate service members; or any statement or representations comparing, directly or by implication, respondent's real estate service to other real estate franchisors as to membership standards or member calibre, unless respondent possesses and relies upon a reasonable basis for such statements or representations.

(B) (1) For purposes of paragraph II(A), a reasonable basis shall consist of reliable and competent evidence that substantiates such statements.

(2) To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of paragraph II(B)(1) only if those tests, analyses, research, studies, or other evidence,

(a) are conducted and evaluated in a disinterested and sufficiently skilled fashion; and

(b) use procedures generally accepted in the profession or science, so that accurate and reliable results are best insured.

III

It is further ordered, That the respondent shall initiate and pay the cost of sending, within thirty (30) days of the date this order is final, to all members of the real estate service, a copy of this order and consent agreement, an accompanying cover letter (attached, and hereto incorporated, as Attachment A) and an acknowledgement form (attached, and hereto incorporated, as Attachment B). No liability will be imposed on respondent on account of any member of respondent's real estate service which willfully, or otherwise, refuses in any manner to comply with said request, or which engages in any advertising or utilizes promotional material which respondent is prohibited from disseminating or utilizing under Paragraph I above, provided respondent has complied with this paragraph, and paragraph IV (D) of this order.

IV

(A) *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

(B) *It is further ordered,* That respondent shall, within ninety (90) days after this Order becomes final, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

(C) *It is further ordered,* That respondent shall maintain files and records of all substantiation related to the requirements of this order for a period of three (3) years after the dissemination of any advertisement, which shall be made available to the Commission upon request for inspection and copying.

(D) *It is further ordered,* That respondents shall maintain files and records of all acknowledgement forms (Attachment B) and advertising and promotional materials returned to its real estate service's members pursuant to Paragraph III of this order for a period of six (6) months after this order becomes final, which shall be made available to the Commission upon request for inspection and copying.

ATTACHMENT A

Dear _____:

Enclosed please find a copy of a provisionally accepted consent order entered into between Meredith Corporation and the Federal Trade Commission. The agreement stems from an FTC investigation of certain advertisements and promotional materials for Better Homes and Gardens Real Estate Service. The agreement is for settlement purposes only and does not constitute an admission by Meredith Corporation or the Real Estate Service that the law has been violated or that the facts are true as alleged in a proposed complaint submitted by the Federal Trade Commission to Meredith.

Please review the enclosed consent order which we have entered into with the Federal Trade Commission. As part of our settlement, we request that you no longer use, and return to us, the following promotional and advertising materials:

I. *Ads To Be Returned:*

A. *Openings/Anniversaries*
1. "Important News"—60-second radio

B. *Front Yard*
1. "Front Yard"—60-second radio

C. *Myth/Fact*
1. "Five Myths" (1–5) - print—local and national
2. "More Myths" (6–10), (11–15) - print—local and national
3. "Four Myths" (1–4) - print—local

D. *Selection*
1. "Crowd"—30-second - television - local and national
2. "Crowd"—10-second - television - local
3. "Finance II"—30-second radio
4. "Finance III"—60-second radio
5. "Mortgage"—60-second radio
6. "Leaders"—30-second radio
7. "Good Selection"—60-second radio
8. "Out Of Every 72 . . ." crowd print—national
9. "He Seemed Like . . ." crossed fingers print—national
10. "The Way A Lot Of Americans . . ." coin print—national
11. "Out Of Every 72 . . ." crowd print—local
12. "He Seemed Like A Nice Guy . . ." crossed fingers print—local
13. "The Way A Lot Of Americans . . ." coin print—local
14. "It's A Buyer's Market" print—local
15. "Seven Tough Questions . . ." print—local
16. "We Can Help You Find Financing" print—local

II. *Promotional Materials To Be Returned:*
1. "Selecting A Real Estate Firm" coin brochure—local
2. "Out Of Every 72 . . ." ad reprints
3. "He Seemed Like A Nice Guy . . ." ad reprints
4. "The Way A Lot Of Americans . . ." ad reprints
5. "The Home Protection Plan . . ." (buyer) brochure
6. "The Home Protection Plan . . ." (seller) brochure
7. "Fifty-six Years Of Trust" ad reprints
8. "This Means A Lot More . . ." (clock) print—national

You should be advised that the Federal Trade Commission may treat the dissemination of any such advertising or promotional materials as a violation of Section 5 of the Federal Trade Commission Act. We further request that you return the attached acknowledgment form, which must be made available to the Federal Trade Commission staff upon request.

Thank you for your prompt attention to this matter.

Sincerely,

Meredith Corporation

ATTACHMENT B

I hereby acknowledge receipt of the consent agreement entered into between Meredith Corporation and the Federal Trade Commission. Pursuant to that order, I am returning to Meredith Corporation the following advertising and promotional materials (identified by number):

_____

_____

_____

_____

_____

I understand that dissemination of any of the advertising or promotional material covered by the order may be found to violate the Federal Trade Commission Act.

By _____

For _____
(Name of Member Firm)

IN THE MATTER OF

ILLINOIS CENTRAL INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-2370. Consent Order, March 26, 1973—Modifying Order, March 16, 1983

The Federal Trade Commission has reopened this matter and declared that Paragraph VI of the order issued on March 26, 1973 (82 F.T.C. 1097) shall be of no further force and effect. Paragraph VI barred Midas-International Corp., an IC subsidiary, from purchasing any product containing automotive brake friction material manufactured by Abex Corp., another IC subsidiary.

ORDER MODIFYING DECISION AND ORDER

On November 16, 1982, respondent IC Industries, Inc. (formerly Illinois Central Industries, Inc.) ("IC") filed its "Petition Pursuant To Rule 2.51 To Reopen And Modify Consent Order" ("Petition"). The Petition asked that the Commission reopen the consent order that issued on March 26, 1973 in this matter ("the order") and set aside Paragraph VI thereof. Paragraph VI of the order perpetually bans IC's subsidiary, Midas-International Corporation ("Midas") from purchasing, directly or indirectly, any products containing automotive brake friction materials manufactured by Abex Corporation ("Abex"), another subsidiary of IC. It also bans Midas from selling or distributing such products. Paragraph VI likewise perpetually bars Midas from purchasing automotive flashers from IC or from selling or distributing such flashers manufactured by IC. IC's Petition was on the public record for thirty days and no comments were received.

Based on respondent's Petition and on other information available to it, the Commission has determined that IC has made a satisfactory showing that the public interest warrants reopening and modification of the order in the manner requested by respondent. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph VI of the Commission's order shall be of no further force and effect as of the effective date of this modifying order.

IN THE MATTER OF

GOLDEN TABS PHARMACEUTICAL CO., INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8792. Final Order, March 16, 1970—Modifying Order, March 17, 1983

This order reopens the proceeding and modifies the Commission's order issued on March 16, 1970 (77 F.T.C. 277), by allowing respondent to disclose, clearly and conspicuously any place in advertisements, that there are conditions and obligations attendant upon acceptance of free or nominally priced offers. The modified order also reflects the company's new name and deletes from the order the name of the company's founder, Michael Posen.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On November 17, 1982 Golden Tabs Pharmaceutical Co., Inc., respondent in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the order entered therein.

The order, which was entered in 1970, covers "Golden 50 Tabulets" or any food, drug, device or cosmetic. The complaint, which was issued on July 17, 1969, alleged, among other things, that respondent had represented in advertisements that Golden 50 Tabulets would be sent free to persons responding to respondents' advertisements and that persons answering said advertisements will be under no obligation to purchase additional supplies of respondents' products. In truth and in fact, the Hearing Examiner found that the 30 day supply of respondents' product were not free for the reason that the offer was an inseparable part of a plan under which respondents, after the receipt of the 30 day supply by those who accepted the offer, shipped additional monthly supplies of the product and attempted to collect the price for these shipments. Furthermore, the Examiner found that persons answering the ads are under an obligation to purchase additional supplies or to notify respondents to cancel further shipments. After sending the 30 day supply, respondents shipped additional supplies each month, mailed statements requesting payment and threatened visits by company representatives in an attempt to collect payment. The Examiner also found that in many cases even if persons notified respondents that they did not wish additional supplies to be sent, respondents continued to ship supplies of said product to those persons and attempted to collect the price.

The Examiner issued an order, which, among other things, prohibited respondent in paragraph 1(b) of the order from representing that "any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the 'free' or other offer." The respondents did not appeal from the initial decision and the Commission thereafter adopted the decision and order.

Petitioner now seeks to modify one provision of that order, by adding a provision to paragraph 1(b) of the order which would permit respondent to have the option of clearly and conspicuously disclosing, when the free or other offer is made, that there are obligations attendant upon acceptance of the free or nominally priced offer and then clearly and conspicuously disclosing the complete terms of the offer elsewhere. Thus, the alternative language would not require that respondent disclose all the conditions "within close proximity to the free or other offer" as is now mandated.

While the Commission supports petitioner's proposed revisions to the order, the Commission has, without objection from petitioner, added a proviso to that portion of paragraph 1(b)(2) which would permit respondent to disclose the complete terms of the offer elsewhere in the advertisement. As revised herein, where respondent exercises this option and also includes in the advertisement a coupon, signature space or other means by which a consumer is intended to accept the offer, it is required to disclose the complete terms of the offer on or in close proximity to the coupon or other space provided.

The alternative language, as revised, should be sufficient to ensure that consumers are aware of their obligations in accepting the free or other offer. Not only would respondent be required by the modified order to disclose clearly and conspicuously and within close proximity to the offer that there are other conditions that a consumer assumes upon accepting the offer, but the respondent must clearly and conspicuously set forth on a coupon or other offer acceptance form included in the advertisement or, if no such form is provided, elsewhere in the advertisement the complete details, conditions, and obligations. Thus, assuming that the proper language is used, a consumer can be expected to be aware of the obligations attendant upon acceptance of the offer.

In its petition at page 8, respondent suggests that the modified order would be satisfied by placing, clearly, conspicuously, and within close proximity to the offer, such terms as "with membership", "with club membership", "when you join", "when you rejoin", "see details of plan in enrollment coupon", "see details of offer below", "see de-

tails inside", and other similar terms which clearly convey to the consumer a further obligation upon acceptance of the offer. Respondent should be advised that, in granting the petition, the Commission does not agree that all of the above terms would constitute satisfactory compliance with the modified order. In particular, in the Commission's view, the terms "see details inside" or "see details of offer below," even if placed "clearly, conspicuously and in close proximity" to the offer, are too imprecise to adequately inform consumers that there are further *obligations* attendant upon acceptance of the offer.

With the above noted order revision and compliance caveat, the Commission has decided to grant the petition. Moreover, having been informed by staff that the petitioner has no objection, the Commission also has made two other changes in the order. Because respondent Michael Posen has died, the Commission has deleted his name from the order, and it has changed the name of the corporate respondent, from Golden Fifty Pharmaceutical Co., Inc. to Golden Tabs Pharmaceutical Co., Inc.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued July 17, 1969, in Docket No. 8792 is hereby modified to read as follows:

Order

It is ordered, That respondent Golden Tabs Pharmaceutical Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated "Golden 50 Tabulets," or any food, drug, device or cosmetic do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing the dissemination of, by means of the United States mail or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which:

(a) Represents directly or by implication that respondent is a manufacturer of vitamin and/or mineral preparations or maintains laboratory facilities concerned with the formulation, testing or performance of vitamin and/or mineral preparations.

(b) Represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the "free" or other offer,

or, alternatively,

represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless (1) respondent discloses clearly, conspicuously, and within close proximity to the free or other offer that there is a further obligation upon the consumer upon acceptance of the offer, and (2) respondent also discloses clearly and conspicuously elsewhere in the advertisement the complete details, conditions, and obligations attendant upon acceptance of the offer, *provided further* that, if the advertisement includes a coupon, signature space, or other designated means by which the consumer is intended to accept the offer, respondent discloses clearly and conspicuously on or in close proximity to the coupon or other space provided for acceptance of the offer the complete details, conditions and obligations attendant upon acceptance of the offer, but such complete disclosure need not appear more than once in the advertisement, including the coupon.

(c) Represents directly or by implication that an offer is made without "further obligation," or with "no risk," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer when in fact there is an obligation incurred by the recipient.

(d) Represents directly or by implication that an offer is made to only a limited customer group or for only a limited period of time when no such limitations are imposed by respondents.

(e) Represents directly or by implication that such products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which said guarantor will perform thereunder are clearly and conspicuously disclosed therewith.

(f) Represents directly or indirectly that any product or combination of products identified, described or specified, directly or by implication, is being offered for sale, as a "gift" or otherwise, unless such offer does contain the items as specified, described or otherwise identified.

(g) Represents directly or indirectly that any product or combination of products which are offered for sale, "free," as a "gift," or otherwise is or are of regular commercial size when such product or product are of "trial," "sample," or otherwise less than regular commercial size.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or in-

directly, the purchase of respondent's products in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited by Paragraph 1 hereof.

It is further ordered, That respondent and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of "Golden 50 Tabulets" or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Shipping or sending any merchandise to any person without the prior authorization or prior consent of the person to whom such merchandise is sent and attempting, or causing to attempt, the collection of the price thereof.

2. Shipping or sending any merchandise to any person and attempting, or causing to attempt, the collection of the price thereof when a notification of refusal of such merchandise, or a notification of cancellation for any further shipments of merchandise, has been sent by such persons and received by respondent.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service of this modified order upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

In the Matter of

MIB, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3108. Complaint, March 21, 1983—Decision, March 21, 1983

This consent order requires a Westwood, Mass. non-profit medical reporting agency, among other things, to cease reporting that a code in a consumer's file has been cancelled or deleted, except to report the cancellation or deletion to a person who was previously informed of the code's existence. The order prohibits respondent from conditioning the release of information to a consumer on his/her execution of a waiver of claims against the firm, and from representing to consumers that their statements concerning disputed items be limited to 100 words or less, unless at the same time, respondent offers to assist the consumer in preparing the statement. Additionally, the firm must timely reinvestigate disputed information; contact, where possible, the source(s) of disputed information or other persons identified by the consumer who may possess information relevant to the challenged data and modify its files accordingly.

Appearances

For the Commission: *William P. McDonough* and *Stephen P. Fauteux.*

For the respondent: *David B. Lytle, Hogan & Hartson,* Washington, D.C.

Complaint

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, the Federal Trade Commission (Commission), having reason to believe that MIB, Inc., d/b/a Medical Information Bureau (MIB), has violated provisions of those Acts, and it appearing to the Commission that a proceeding by it in respect to those violations would be in the public interest, the Commission issues this complaint.

1. For the purposes of this complaint, the terms *consumer, consumer report, consumer reporting agency, file, person,* and *medical information* are defined as set forth in Section 603 of the Fair Credit Reporting Act (Act).

2. MIB is a nonprofit corporation, organized, existing, and doing business under the laws of Delaware, with its principal office and

place of business located at 160 University Avenue, Westwood, Massachusetts.

3. MIB's membership consists of approximately 700 life insurance companies (members) located throughout the United States and Canada.

4. Among its activities, MIB operates a confidential exchange of information among its members. To effectuate the information exchange, MIB's members are required to report to MIB information concerning insurance applicants received by the members from original medical and other sources, from official records, or from the applicant during the course of an insurance application.

5. All information reported to MIB by its members is reported in coded form pursuant to MIB's Manual, "Official List of Impairments" (Code Manual). The Code Manual contains a list of approximately 190 medical impairments and 7 supplementary nonmedical impairments, each of which is signified by a three-digit numerical code. The Code Manual also contains procedures for reporting these impairments, including requiring the use of a system of letters (as many as five in a sequence following the three-digit impairment code), which indicate among other things, when the impairment first appeared, whether it is present at the time of the application, or whether the condition is under treatment.

6. MIB files the coded information it receives from its members in its computer.

7. MIB uses this coded information to provide its "checking service" to its members. Under the "checking service," a member who has received an insurance application may request from MIB whatever coded information MIB has in its files on the applicant. In response to such a request, MIB transmits a report to the requesting member, either by wire or by mail.

8. These MIB reports bear on consumers' personal characteristics, and they are used in whole or in part for the purpose of serving as a factor in establishing consumers' eligibility for insurance to be used primarily for personal purposes. Therefore, these reports are consumer reports.

9. MIB is regularly engaged on a cooperative nonprofit basis in assembling information on consumers for the purpose of furnishing consumer reports to third parties through the means and facilities of interstate commerce. Therefore, it is a consumer reporting agency.

10. As of at least 1976, MIB maintained coded information on approximately 11 million persons, and in 1979 it received from its members 20,163,964 checking inquiries and 2,262,938 reports. In 1977 MIB received $9,739,597.00 in assessments and charges from its members.

11. The acts and practices alleged herein took place and are taking

place in the ordinary course and conduct of MIB's activities and have occurred on or after April 24, 1971, the effective date of the Act.

Count I

12. The allegations of paragraphs 1–11 above are incorporated by reference herein.

13. When MIB deletes from its files an adverse item of information because it has become obsolete within the meaning of Section 605(a) of the Act or because it was found inaccurate or unverifiable after a reinvestigation pursuant to Section 611(a) of the Act, in some cases it puts in its records the notation "cancelled" or "purged." In a substantial number of instances the notations have been included in subsequent consumer reports sent to members.

14. The notations described in paragraph 13 have been included in a substantial number of reports used in connection with the underwriting of life insurance involving a principal amount of less than $50,000 and the item of information was deleted because it was obsolete within the meaning of Section 605 of the Act. By this practice, MIB has failed to maintain procedures to avoid violations of Section 605 of the Act and, therefore, has violated Sections 605 and 607(a) of the Act.

15. The notations described in paragraph 13 have been included in a substantial number of reports in which the item of information was deleted because it was found inaccurate or unverifiable after a reinvestigation pursuant to Section 611(a) of the Act. By this practice, MIB has violated Section 611(a) of the Act.

Count II

16. The allegations of paragraph 1–11 above are incorporated by reference herein.

17. A substantial number of consumers have requested disclosure of the nature and substance of the non-medical information in their MIB files, and have given MIB proper identification. In all such instances MIB requires the consumer requesting disclosure to complete MIB Form D–2 as a prerequisite to obtaining such disclosure. (A copy of Form D–2 is attached as Appendix A). Completion of Form D–2 requires a consumer to, among other things, sign a release stating:

> Except as to false information furnished with malice or willful intent to injure and except as to liability for willful noncompliance or for negligent noncompliance as in the Federal Fair Credit Reporting Act (FCRA), I release the MIB and its members and any person who furnishes information to MIB or its members from any claims or suits based on any information disclosed as a result of this request.

18. Under Section 609(a) of the Act, upon request and the showing

of proper identification, a consumer is entitled to, among other things, disclosure of the nature and substance of all information (except medical information) maintained in his or her file by MIB.

19. The requirement of the Form D–2 release for disclosure of the nature and substance of such non-medical information constitutes more than "proper identification." Therefore, MIB has violated and is violating Section 609(a) of the Act.

Count III

20. The allegations of paragraphs 1–11 above are incorporated by reference herein.

21. When consumers inform MIB that they dispute the completeness or accuracy of an item of information in MIB's files, in a substantial number of instances MIB:

a. requires consumers to first complete the MIB Form D–2 which, in turn, requires the consumers to sign a release in MIB's favor, to identify a physician to whom disclosure will be made, and to obtain a non-related witness's signature. By not initiating reinvestigation until the consumer complies with these procedures, MIB, in some instances, fails to reinvestigate the disputed item of information within a reasonable period of time after receiving notice of the consumer's dispute;

b. fails to include as part of its reinvestigation contacting the original sources of the information or such other sources as the consumer identifies in disputing the information as being likely to have information on the subject of the dispute; and

c. fails to record, after reinvestigation, the current status of disputed information.

22. Under Section 611(a) of the Act, if the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer, and the dispute is directly conveyed to MIB, MIB must within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute is frivolous or irrelevant. Furthermore, under Section 611(a), if after the reinvestigation the information is found to be inaccurate or can no longer be verified, MIB must promptly delete the information.

23. By the acts described in paragraph 21, MIB has violated and is violating Section 611(a) of the Act.

Count IV

24. The allegations of paragraphs 1–11 above are incorporated by reference herein.

25. When MIB determines after reinvestigation not to modify or delete information that has been disputed by a consumer, in a substantial number of instances it notifies the consumers:

The federal Fair Credit Reporting Act of 1970 provides that you may file a brief statement of disputed accuracy. The statement should contain 100 words or less and it should set forth the nature of the dispute.

26. The two statements in the above notice, read together, suggest that it is the Act that requires the consumer to limit his statement to 100 words or less, when in fact, Section 611(b) of the Act allows MIB to impose such a limitation only if it provides assistance to the consumer in preparing such a statement. Therefore, MIB has violated and is violating Section 611(b) of the Act.

27. The acts and practices set forth in paragraphs 12–26 were and are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of the Act, such acts and practices constitute violations of Section 5(a) of the Federal Trade Commission Act.

Request for Disclosure
Submitted to Medical Information Bureau (MIB)
P. O. Box 105, Essex Station, Boston MA 02112

IDENTIFICATION INFORMATION (Please print):

Name: _____ _____ _____
(Last name (surname)) (First name (given name)) (Middle name)

Date of Birth: _____ _____ _____
(month) (day) (year)

Birthplace: _____
(Give state (of U. S.) or Province (of Canada); if other, give country)

Present Address: _____
(street) (town or city)

_____
(state and zip code) (telephone number)

DISCLOSURE: I request disclosure of the meaning of my MIB record, if any. I understand MIB will require reporting member companies to disclose any medical information in my MIB record to my personal physician.

_____
(name of personal physician)

_____
(street) (city/state) (zip code)

As to non-medical information, I prefer disclosure by the one method checked below. (If method 2 or 3 is checked, insert a date which is about 15 days after you mail this form; also, select an hour between 10:00 AM and 4:00 PM on any weekday except holidays in Massachusetts).

☐ 1: By letter to my address as given above.

☐ 2: By reverse charge phone call at my phone number given above on

_____
(insert date and hour in Eastern Time Zone)

☐ 3: By appointment on _____ at the above MIB office.
(insert date and hour)

Except as to false information furnished with malice or willful intent to injure and except as to liability for willful noncompliance or for negligent noncompliance as in the Federal Fair Credit Reporting Act (FCRA), I release the MIB and its members and any person who furnishes information to MIB or its members from any claims or suits based on any information disclosed as a result of this request.

_____ _____
(insert month, day and year) (Signature of Individual Requesting Disclosure)

I, (an adult person), witnessed the above signature and I represent that the person who made the above signature is known to me (but is not related to me), and is the person described above

Present address of witness:

_____ Street _____
(Signature of witness)

Town or city _____

_____ State and zip code _____
(Print name of witness)

Attachment A

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fair Credit Reporting Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent MIB, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 160 University Avenue in the Town of Westwood, Commonwealth of Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For purposes of this order, the following definitions shall apply:

A. *The Act* means the Fair Credit Reporting Act, Pub. Law No. 91–508, 15 U.S.C. 1681 *et seq.*

B. The terms *person, consumer, consumer report, file* and *medical information* are as defined in Section 603 (b), (c), (d), (g), and (i), respectively, of the Act.

C. The term *medical source* means a person from whom medical information may be obtained in accordance with Section 603(i) of the Act, namely a licensed physician or medical practioner, hospital, clinic or other medical or medically related facility which provided or provides the information with the consent of the individual to whom the information relates.

II.

It is ordered, That MIB, Inc. ("MIB"), its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection, preparation, assembly or furnishing of a consumer report shall cease and desist from:

A. Reporting, directly or indirectly, that a code in a consumer's MIB file has been cancelled or deleted, except to report the cancellation or deletion to a person who was previously informed of the existence of the code.

B. Requiring, as a condition for disclosure of information (except the nature and substance of medical information) pursuant to Section 609 of the Act, that the consumer seeking disclosure execute a waiver or release of claims against MIB based on the information disclosed.

C. Failing, if the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer and such dispute is directly conveyed to MIB by the consumer, to reinvestigate the disputed item within a reasonable period of time, unless MIB has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant, *provided* that where the consumer has failed to provide information sufficient to permit MIB to identify in its records the consumer and the item in dispute, MIB may require the consumer to provide such information before initiating a reinvestigation.

D. Failing, in connection with the reinvestigation of a disputed item of medical information pursuant to Section 611 of the Act:

1. to include as part of such reinvestigation a reasonable effort to contact (a) the medical source or sources who originally provided the information upon which the disputed item is based and (b) other medical sources identified by the consumer who may reasonably be expected to have additional information directly relevant to the disputed item;

2. to complete such reinvestigation within a reasonable period of time, *provided* that 30 days shall be presumptively deemed a reasonable period of time, in the absence of unusual circumstances;

3. if after such reinvestigation the disputed item is found to be inaccurate or unverifiable, promptly to delete the item from the consumer's MIB file; and

4. if after such reinvestigation the disputed item is found to be accurate and verifiable but incomplete, to make the item complete by adding to the consumer's MIB file any additional information learned through the reinvestigation and necessary for a proper understanding of the disputed item, including where applicable, the fact of recovery or improvement.

E. Representing, directly or indirectly, to consumers that their dispute statement under Section 611(b) of the Act is limited to 100 words or less, unless MIB at the same time informs the consumer that it will assist the consumer in writing such a statement.

III.

It is further ordered, That MIB mail a copy of this order to all of its members by certified mail, return receipt requested; that MIB deliver a copy of this order to all present and future MIB employees engaged in handling consumer requests for disclosure under Section 609 of the Act or disputes of accuracy or completeness under Section 611 of the Act; and that MIB secure a signed statement acknowledging receipt of a copy of this order from all such employees.

IV.

It is further ordered, That MIB notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That MIB shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ETHYL CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9128. Complaint, May 30, 1979—Final Order, March 22, 1983

This Final Order requires the nation's two leading producers of lead-based antiknock gasoline additives, among other things, to cease announcing price changes in advance of the period contractually required for advance notice to customers, and using a "most-favored-nation" clause in any contract for the sale or delivery of lead-based antiknock compounds. Further, when stating a delivered price for any lead-based antiknock compound, the companies must also quote the product's point of origin price, a separate price for shipment, and allow customers to arrange for their own shipping and delivery. While the order does not prohibit the companies when acting individually from selecting their own customers, establishing their own prices, and selling at a delivered price or point of origin in good faith to meet the equally low price of a competitor, it does not exempt the companies' pricing practices from antitrust law.

Appearances

For the Commission: *Robert A. Burka, Edward T. Colbert, Thomas J. Keary, Stephen C. Palmer, Peter M. Kazon* and *Raymond T. Diamond.*

For the respondents: *Daniel K. Mayers, John H. Harwood, David Westin* and *Kathleen M. Russo, Wilmer, Cutler & Pickering,* Washington, D.C., for Ethyl Corporation. *Daniel M. Gribbon, Allan J. Topol, Terry Coleman* and *Edward R. Mackiewicz, Covington & Burling,* Washington, D.C. and *W.E. MacIntyre,* in-house counsel, for E.I. du Pont de Nemours and Co. *Alan S. Ward, Shirley Z. Johnson, Thomas J. Segal* and *Phillip A. Proger, Baker & Hostetler,* Washington, D.C., *Louis R. Sernoff* and *Michael Kelly, Morgan, Lewis & Bockius,* Washington, D.C. and *John W. Thomas,* in-house counsel, for PPG Industries, Inc. *Champ W. Davis* and *David C. Bogan, Chadwell, Kayser, Ruggles, McGee & Hastings,* Chicago, Ill. and *James S. Lambe,* in-house counsel, for Nalco Chemical Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceed-

ing by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

Definition

1. For the purpose of this complaint the following definition shall apply:

Leadbased antiknock compounds mean additives to gasoline which increase its octane rating and which contain tetraethyl or tetramethyl lead.

ETHYL CORPORATION

2. Respondent Ethyl Corporation ("Ethyl") is a corporation organized under the laws of the Commonwealth of Virginia, with its principal place of business at 330 South Fourth Street, Richmond, Virginia. In 1977, its sales were in excess of $1.2 billion, assets were over $974 million, and net income was approximately $78 million.

3. Ethyl is a manufacturer and seller of leadbased antiknock compounds in the United States with production [2] facilities in Baton Rouge, Louisiana and Pasadena, Texas. Its gross sales of leadbased antiknock compounds in 1977 were in excess of $200 million, or more than 30% of domestic United States leadbased antiknock compound sales.

E.I. DU PONT DE NEMOURS AND COMPANY

4. Respondent E.I. du Pont de Nemours and Company ("Du Pont") is a corporation organized under the laws of the State of Delaware with its principal place of business at 1007 Market Street, Wilmington, Delaware. In 1977, its sales were in excess of $9.4 billion, assets were over $7.4 billion, and net income was approximately $545 million.

5. Du Pont is a manufacturer and seller of leadbased antiknock compounds in the United States with production facilities in Deepwater, New Jersey and Antioch, California and a blending facility in Houston, Texas. Its gross sales of leadbased antiknock compounds in 1977 were in excess of $200 million, or more than 30% of domestic United States leadbased antiknock compound sales.

PPG INDUSTRIES, INC.

6. Respondent PPG Industries, Inc. ("PPG") is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principal place of business at One Gateway Center, Pittsburgh, Pennsylvania. In 1977, its sales were in excess of $2.5 billion, assets were over $2.1 billion, and net income was approximately $91 million.

7. PPG is a manufacturer and seller of leadbased antiknock compounds in the United States with a production facility located in Beaumont, Texas. Its gross sales of leadbased antiknock compounds in 1977 were in excess of $75 million, or more than 10% of the domestic United States leadbased antiknock compound sales.

NALCO CHEMICAL COMPANY

8. Respondent Nalco Chemical Company ("Nalco") is a corporation organized under the laws of the State of Delaware with its principal place of business at 2901 Butterfield Road, Oak Brook, Illinois. In 1977, its sales were in excess of $445 million, assets were over $285 million, and net income was approximately $50 million. [3]

9. Nalco is a manufacturer and seller of leadbased antiknock compounds in the United States with a production facility in Freeport, Texas. Its gross sales of leadbased antiknock compounds in 1977 were in excess of $75 million, or more than 10% of domestic United States leadbased antiknock compound sales.

LEADBASED ANTIKNOCK COMPOUND MARKET

10. The leadbased antiknock compounds produced by each respondent are substantially identical. The four respondents are the only firms which sell leadbased antiknock compounds in the United States. There has been no entry into the market for over 15 years, and during much of the period from at least 1974 to the present, the industry has operated at substantially less than capacity.

JURISDICTION

11. Leadbased antiknock compounds are sold and shipped by respondents from their principal places of business and production facilities to customers located throughout the United States. In the course and conduct of such sales, respondents have engaged in the acts and practices hereinbelow alleged in or affecting such commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACTS AND PRACTICES

12. In the course of their leadbased antiknock compound businesses, respondents have engaged and continue to engage in the following acts, practices, and methods of competition, among others:

(a) Each respondent has quoted and sold leadbased antiknock compounds only on the basis of a delivered price inclusive of transportation;

(b) Respondents Ethyl and Du Pont have utilized a "most favored

nation" clause in their standard form sales contracts which promises that the buyer will receive the lowest price at which the same product is sold to any other customer, and have followed a policy of granting such treatment when sales are on a spot basis and not pursuant to an existing contract. Respondent Nalco has used a "most favored nation" clause in a substantial number of its sales contracts; [4]

(c) Each respondent (i) has utilized a 30–day advance notice of price change clause in sales contracts, and (ii) has frequently given advance notice of price changes to the press, directly or indirectly to other respondents, and to existing and potential customers in excess of 30 days.

EFFECT AND VIOLATION

13. The acts, practices, and methods of competition of respondents as hereinabove alleged have individually and in combination had the effect of reducing uncertainty about competitors' prices of leadbased antiknock compounds. Such reduced uncertainty has unfairly facilitated the maintenance of substantially uniform price levels and the reduction or elimination of price competition in the leadbased antiknock compound market.

14. The aforesaid acts, practices, and methods of competition of the respondents, individually and in combination, constitute unfair methods of competition in or affecting commerce and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

AUGUST 5, 1981

PRELIMINARY STATEMENT

On May 30, 1979, the Commission filed the complaint in this proceeding charging that respondents Ethyl Corporation, E.I. du Pont de Nemours and Company, PPG Industries, Inc., and Nalco Chemical Company had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[1] It is alleged that these four companies have engaged in certain marketing practices which had the effect of reducing uncertainty about competitors' prices of lead-based antiknock compounds; such reduced uncertainty, it is alleged, unfairly facilitated

[1] Respondents, individually, were formally notified of the Commission's investigation of their marketing practices in the lead-based antiknock compound market in early January, 1978. (CX 2210A-D)

the maintenance of substantially uniform price levels and the reduction or elimination of price competition in the lead-based antiknock compound market. (Complaint, Par. 13)

Paragraph 12 of the complaint identifies these marketing practices as follows:

(a) Each respondent has quoted and sold lead-based antiknock compounds only on the basis of a delivered price inclusive of transportation;

(b) Respondents Ethyl and Du Pont have utilized a "most favored nation" clause in their standard form sales contracts which promises that the buyer will receive the lowest price at which the same product is sold to any other customer, and have followed a policy of granting such treatment when sales are on a spot basis and not pursuant to an existing contract. Respondent Nalco has used a "most favored nation" clause in a substantial number of its sales contracts; and

(c) Each respondent (i) has utilized a 30–day advance notice of price change clause in sales contracts, and (ii) has frequently given advance notice of price changes to the press, directly or indirectly to other respondents, and to existing and potential customers in excess of 30 days.

In separately filed answers, each respondent generally admitted the use of some or all of these practices, as alleged in the complaint, but denied that they had the effect of reducing uncertainty about competitors' prices, or that they facilitated uniform price levels in the lead-based antiknock compound market. In addition to denying that these practices had any effect on competition, respondents also raised issues [3] concerning the relationship between the practices and the free speech protection provided in the First Amendment to the Constitution of the United States. While respondents admitted certain jurisdictional facts and that each respondent shipped lead-based antiknock compounds in interstate commerce, each denied that the challenged practices violated the Federal Trade Commission Act.

Nalco, joined by Ethyl and Du Pont, moved on May 20, 1980, for summary decision, which was denied by an order dated June 10, 1980.

Following reciprocal discovery by all parties, the administrative trial commenced on June 9, 1980. Complaint counsel concluded its case-in-chief on July 24, 1980, after 25 days of hearings. Complaint counsel called as witnesses 12 employees of respondents, seven employees of various-sized oil refining companies, and Dr. George Hay, a professor of law and economics from Cornell Law School. Respondents' motions to dismiss at the close of complaint counsel's case-in-chief were denied.

Ethyl's defense began on October 7, 1980, continued for four days during which it called to testify two of its employees, three employees of independent refining companies, an employee of National Economic Research Associates, and Jesse W. Markham, an economist from the Harvard Business School. Du Pont's defense began October 14,

1980, continued for six days, and consisted of the testimony of four of its employees, the employee of an independent refining company, and H. Michael Mann, an economist from Boston College. PPG's defense began October 23, 1980, continued for five days, and consisted of the testimony of three of its employees, two employees of consulting firms, and Michael Glassman, an economist from Glassman-Oliver Economic Consultants Inc. Nalco's defense began November 5, 1980, continued for three days, and consisted of the testimony of one of its employees, and Dennis William Carlton, an economist from the University of Chicago.

On rebuttal, complaint counsel presented two employees of the Federal Trade Commission—Charles A. Pidano, Jr., a certified public accountant, and David T. Sheffman, an economist,[2] during the week of December 8, 1980. Respondents Du Pont and Nalco each presented one surrebuttal witness, an employee of Du Pont, and Nalco's economist, Dr. Carlton, during February 1980. [4]

During the course of the proceeding over 3300 exhibits were admitted in evidence, and the transcript of testimony exceeds 8,000 pages. The record was formally closed on March 23, 1981.

A motion to dismiss the complaint was filed by Du Pont on October 10, 1980. By order of October 22, 1980, a ruling on the motion was deferred until after the close of the record and submission of briefs. In November, Nalco renewed its motion for summary decision. A ruling on this motion was deferred as well.

On October 1, 1979, Du Pont filed a lawsuit against the Commission and its individual Commissioners in U.S. District Court for the District of Delaware. Du Pont, subsequently joined by Ethyl and PPG as *amici curiae,* sought a declaration (but no injunctive relief) that the issuance of the instant complaint exceeded the scope of the Commission's authority because the challenged practices are not unfair or unlawful under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Du Pont also asserted that the prohibition on public announcements of antiknock compound prices in the Commission's Notice Order violated Du Pont's rights under the First Amendment to the Constitution. In November 1979, Du Pont moved for summary judgment before the district court and the Commission subsequently moved to dismiss the complaint. The district court, per Chief Judge Latcham, denied Du Pont's motion on April 9, 1980 and granted the Commission's motion to dismiss the complaint because of Du Pont's failure to exhaust its administrative remedies. The court further held that issuance of the complaint did not impede constitutionally-protected speech. *E. I. du Pont de Nemours and Co.* v. *FTC,* 488 F. Supp.

[2] Dr. Scheffman is a tenured Associate Professor of Economics at the University of Western Ontario, and a visiting staff economist at the FTC's Bureau of Economics.

747 (D. Del. 1980). No notice of appeal from the district court's judgment was filed.

This proceeding is now before the Administrative Law Judge for decision based upon the complaint, the answers, pleadings, testimony and other documentary evidence of record, proposed findings of fact and conclusions of law, and legal authority submitted by the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. All motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of fact and conclusions of law submitted by the parties, the Administrative Law Judge makes [5] the following findings of fact and conclusions, and issues the Order set out at the end hereof.[3]

Findings of Fact

I. IDENTITY OF THE RESPONDENTS

1. Respondent Ethyl Corporation ("Ethyl") is a Virginia corporation with its principal place of business at 330 South Fourth Street, Richmond, Virginia. In 1977, its sales were in excess of $1.2 billion, its assets were over $974 million, and its net income was approximately $78 million. Ethyl manufactures and sells lead-based antiknock compounds in the United States, with production facilities located in Baton Rouge, Louisiana and Pasadena, Texas. In 1977, its gross sales of antiknock compounds were in excess of $200 million. (Complaint ¶¶ 2–3; Ethyl Answer ¶ 2)

At all times relevant hereto Ethyl has sold and shipped lead-based antiknock compounds in interstate commerce. (Complaint ¶ 2; Ethyl Answer ¶ 5) [6]

2. Respondent E. I. du Pont de Nemours and Company ("Du Pont")

[3] The findings of fact include references to supporting evidentiary items in the record. The supporting evidence cited in each instance is not necessarily all-inclusive of the record evidence. The following abbreviations have been used:

F. – Findings of this Initial Decision followed by the number of the finding being referenced.
References to the transcript are designated by the name of the witness and followed by the page number(s).
CX.- Complaint counsel's exhibits followed by its number and the referenced page(s).
REX.- Ethyl's Exhibits followed by its number and the referenced page(s).
RDX.- Du Pont's Exhibits followed by its number and the referenced page(s).
RPX.- PPG's Exhibits followed by its number and the referenced page(s).
RNX.- Nalco's Exhibits followed by its number and the referenced page(s).

is a Delaware corporation with its principal place of business at 1007 Market Street, Wilmington, Delaware. In 1977, its sales were in excess of $9.4 billion, its assets were over $7.4 billion, and its net income was approximately $545 million. Du Pont manufactures and sells lead-based antiknock compounds in the United States with production facilities located in Deepwater, New Jersey and Antioch, California. Du Pont also has an antiknock compound blending facility in Beaumont, Texas. In 1977, Du Pont's gross domestic antiknock compound sales exceeded $200 million. (Complaint ¶¶ 4–5; Du Pont Answer ¶¶ 4–5)

At all times relevant hereto, Du Pont has sold and shipped lead-based antiknock compounds in interstate commerce. (Complaint ¶2; Du Pont Answer ¶¶ 5, 11)

3. Respondent PPG Industries, Inc. ("PPG") is a Pennsylvania corporation with its principal place of business at One Gateway Center, Pittsburgh, Pennsylvania. In 1977, PPG's sales exceeded $2.5 billion, assets were over $2.1 billion, and net income was approximately $91 million. PPG manufactures and sells lead-based antiknock compounds in the United States with its production facility located in Beaumont, Texas. PPG's gross sales of antiknock compounds were over $75 million in 1977. (Complaint ¶¶ 6–7; PPG Answer ¶¶ 6–7)

At all times relevant hereto PPG has sold and shipped lead-based antiknock compounds in interstate commerce. (Complaint ¶ 2; PPG Answer ¶¶ 7, 11)

4. Respondent Nalco Chemical Company ("Nalco") is a Delaware corporation with its principal place of business at 2901 Butterfield Road, Oak Brook, Illinois. In 1977, Nalco's sales were over $445 million, assets were over $285 million, and net income was approximately $50 million. Nalco manufactures and sells lead-based antiknock compounds in the United States, with its production facility located in Freeport, Texas. Its gross antiknock compound sales were over $75 million in 1977. (Complaint ¶¶ 8–9; Nalco Answer ¶¶ 8–9).

At all times relevant hereto Nalco has sold and shipped lead-based antiknock compounds in interstate commerce. (Complaint ¶ 2; Nalco Answer ¶¶ 9, 11)

II. LEAD-BASED ANTIKNOCK COMPOUNDS

A. *The Product, Its Characteristics And Uses*

5. There are two basic lead antiknock products: tetraethyl lead ("TEL") and tetramethyl lead ("TML"). (Tunis, 36–38; J. M. Robinson, 977–78; CX 922J, 923C) TEL has been commercially manufactured since the mid–1920's. (CX 960 O, 2002Z4) TML was first manufactured commercially in 1960. (CX 960 O) The basic compound is combined

with solvents, dyes, [7] antioxidants, and scavengers to form finished antiknock compound fluid. (Tunis, 39; CX 597E-N) The finished fluid is about 40% elemental (pig) lead. The scavengers combine with the lead in the engine's combustion chamber, so that the lead is exhausted as part of a gaseous compound instead of remaining in the engine. In most cases the scavenger consists of ethylene dichloride and ethylene dibromide. (Altman, 1326–37; Cantwell, 5211–12, 5236; Tunis, 39)

6. Lead-based antiknock compounds are added to motor fuel to improve the octane rating or performance of a gasoline engine. An octane rating is the measure of an engine's resistance to premature detonation, or "knock." (Tunis, 29) Antiknock compounds improve engine performance by slowing the combustion process of the engine to the point that the chemical energy of the fuel is equilibrated to the mechanical capability of the engine to absorb the chemical release, thus reducing "knock," or engine noise and vibration. Use of antiknock compounds allows an engine to do a given amount of work with less gasoline. (Tunis, 29–32, 37; Cantwell, 5168) Only a small amount of lead is contained in a gallon of gasoline. The cost of that lead per gallon of gasoline is minimal. (Day, 666–67; Werling, 3709; J. A. Robinson, 5385–86)

7. Antiknock compounds are usually sold as mixtures of TEL and TML. (Altman, 1382–83) However, some refiners use straight TEL; no refiner uses straight TML. (Altman, 1382–83) In 1976, Ethyl estimated that TML production constituted approximately 20% of total antiknock production. (REX 127P) Generally, TEL is more effective than TML in raising octane ratings when relatively small amounts of antiknock compounds are used. (Day, 611) The relative effect of TEL and TML on gasoline octane ratings is also a function of the gasoline blend available to the refiner. (Tunis, 42–44) TEL and TML may be combined into physical mixes, which are formed by blending the TEL and the TML without any chemical reaction. TEL and TML are more commonly combined into reacted mixes, which are formed by chemically reacting TEL and TML with a catalyst. (Tunis, 37–38; Altman, 1383) Types of antiknock compounds differ depending, *inter alia,* on the proportions of TEL and TML that are used in the physical mixes and the reaction mixes. (Tunis, 38; CX 597G, H, Q)

8. Individual antiknock compounds of a given type produced or sold by one respondent are substantially similar in composition to those of the same type produced or sold by another respondent. (Complaint ¶ 10; Ethyl Answer ¶ 4; Du Pont Answer ¶ 10; Nalco Answer ¶10; Steen, 3395) For example, the 50/50 mixture sold by Du Pont is not substantially different from that sold by Ethyl, Nalco or PPG. There are differences between a 50/50 mixture and a 75/25 mixture. (Tunis, 37–41)

9. Each respondent offers to sell a group of "standard" antiknock compound mixes. (Tunis, 182; Lockerbie, 698–700; J. M. Robinson, 1038; Altman, 1269; *e.g.,* CX 2A, 3A, [8] 4, 9, 13, 599F-G, 600–617, 1113Z22–Z33, 1142–62, 1345–49, 1360A-C) The standard antiknock compound mixes offered for sale by each respondent are listed by trade name on Appendix A, arranged so that each respondent's equivalent mixes are on the same line.

10. Ethyl, Du Pont and PPG offered several "special" or "nonstandard" antiknock compounds. (Lockerbie, 600; Fremd, 1599; Park, 1824–25; McNally, 2192–93; Werling, 3650–51) An Ethyl official testified that less than 1% of sales were nonstandard mixes. (Lockerbie, 820) The composition of special or nonstandard mixes was generally the same as each company's comparably-named standard mix with the exception of the scavenger: the special mixes contained only ethylene dichloride and had no ethylene dibromide. (Tunis, 39–40; Fremd, 1670; Werling, 3623) Special or non-standard mixes are listed on Appendix B, arranged so that equivalent mixes are on the same line.

11. [***]*

12. Lead-based antiknock compounds sold by each of the four respondents are homogenous. (Tunis, 369; CX 960Q; Complaint ¶ 10; Ethyl Answer ¶4; Du Pont Answer ¶10; Nalco Answer ¶ 10; Steen, 3395; Hay, 3803–04, 3998, 4123; J. M. Robinson, 979; Markham, 6781; Carlton, 6959–60; Mann, 5429) There is no variation in the quality or performance of the products sold by each of the four respondents. (Tunis, 369; Charles, 2510; McCormick, 2646, 2702; Solomon, 2816; Wilson, 3195; Steen, 3395; Dana, 4465; CX 960Q)

13. Lead-based antiknock compounds are dangerous to handle because organic lead is flammable and explosive (J. M. Robinson, 1181; Koehnle, 4585–86; Baker, 5757), and can cause serious illness or death if they are ingested or come into direct contact with the human body because they are highly toxic. (Tunis, 46; Altman, 1286; Baker, 5757; White, 5945–46, 5975)

B. *Substitutes for Lead-Based Antiknock Compounds*

14. Products other than lead-based antiknock compounds can be used to increase octane rating. (Tunis, 32–33) Chemicals such as toluene, benzene, and MMT, a manganese-based compound, can be added to gasoline to improve engine performance. (Altman, 1248; Park, 1907–09; McCormick, 2793–96, 2811–12; Werling, 3680; Cantwell, 5170; CX 1953N) These products have not gained commercial acceptance since they are available in only limited quantities and are more costly to use than lead-based antiknock compounds. (Altman, 1248; Park, 1907, 1924; McCormick, 2793–96; Cantwell, 5170; CX

* Throughout this document, [***] refers to *in camera* material that has been excised.

1953N) Certain [9] alcohols may also be used as octane enhancers, but they must be used in significant volumes and are substantially more expensive to use than lead-based antiknock compounds. (McCormick, 2794–96, 2811–12).

15. Octane ratings can also be increased by further refining the crude oil used to produce gasoline. (Tunis, 32–33; Altman, 1392–93; Cantwell, 5168–69) A number of different refining processes may be used, but the most important is catalytic reforming. (Altman, 1392–93; Cantwell, 5169) All of these processes, however, result in a yield loss; that is, more crude oil must be used to produce a given quantity of gasoline. (Tunis, 32–35; Cantwell, 169–70) Therefore, further refining, alone, is nearly always more expensive than adding antiknock compounds because of the increased crude oil costs. (Tunis, 33) Because each incremental unit of antiknock compound has less of an impact on raising octane ratings, at some point the cost of using additional antiknock compounds will exceed the cost of further refining. (Cantwell, 5169–70, 5185–86; RDX 332C) As the price of crude oil increased during the 1970s, the cost of reforming increased, making lead antiknock compounds relatively more valuable to refiners. (Tunis, 35, 51, 370; Day, 552–53; Cantwell, 5173–74) Witnesses uniformly testified that antiknock compounds were the most economical method of enhancing octane. (McCormick, 2634–35; Shouse, 2879; Steen, 3456–57; Fetter, 4538) Refiners had no real alternative to lead-based antiknock compounds. (Day, 554)

III. THE LEAD-BASED ANTIKNOCK COMPOUND MARKET

A. *Early History of the Market*

16. Ethyl's corporate predecessor was formed in 1924 as a joint venture of General Motors Corporation and Standard Oil Company of New Jersey to exploit a patent monopoly on lead-based antiknock compounds. Du Pont controlled General Motors at that time. (Glassman, Tr. 6015)[4] Du Pont, in 1959, was enjoined from voting its General Motors stock and subsequently disposed of its General Motors stock holdings (*see United States* v. *E. I. du Pont de Nemours and Co.,* 177 F. Supp. 1 (N.D. Ill. 1959)). Prior to 1948 Ethyl was the sole domestic marketer of lead-based antiknock compounds, which were first manufactured commercially by Du Pont at Deepwater, New Jersey. After 1938, antiknock compounds were also manufactured by Ethyl [10] in Baton Rouge, Louisiana. (Koehnle, 4645; Glassman, 6015–17) In 1962 Ethyl was purchased by the Albemarle Paper Company and all con-

[4] The history of Ethyl's formation and early relationship with Du Pont is described in detail by the district court in *United States* v. *E. I. du Pont de Nemours & Co.,* 126 F. Supp. 235, 301–13 (N.D. Ill. 1954), *rev'd on other grounds,* 353 U.S. 586 (1957).

nections with General Motors and with the Standard Oil Company of New Jersey were terminated. (Lockerbie, 851)

17. Du Pont began selling lead-based antiknock compounds in 1948 and until the early 1960's, Ethyl and Du Pont were the only domestic producers and marketers of lead-based antiknock compounds. (Lockerbie, 721; Glassman, 6016–17) The Houston Chemical Company entered the lead-based antiknock compound market in August 1961. (J. M. Robinson, 965; Fremd, 1734) Houston Chemical Company, acquired by PPG in March 1963, marketed antiknock compounds under the Houston Chemical Company name until 1978 when the Houston Chemical Company division was merged into PPG's Chemical Division - U.S. Thereafter, antiknock compounds were marketed under the PPG corporate name. (J. M. Robinson, 965–67) Nalco Chemical Company entered the market as a TML manufacturer in approximately 1964, when TML was a relatively new product. (CX 1956N, 960O; Altman, 1387)

B. *The Sellers of Lead-Based Antiknock Compounds*

18. The four respondents are the only domestic marketers of lead-based antiknock compounds. (Complaint ¶ 10; Ethyl Answer ¶4; Du Pont Answer ¶ 10; PPG Answer ¶ 10; Nalco Answer ¶10) No foreign firm has ever sold lead-based antiknock compounds in the United States. (Tunis, 218; Wilson, 3286–87, 3358–60) There are only three commercial manufacturers of each of the two basic lead antiknock products, TEL and TML. Ethyl, Du Pont and PPG each manufactures TEL (Tunis, 40–41; Werling 3630; Baker, 5763; CX 105); Ethyl, Du Pont and Nalco each manufactures TML. (Tunis, 40–41; Altman, 1383–84; Werling, 3630; Hay 3805; CX 105)

C. *The Purchasers of Lead-Based Antiknock Compounds*

19. Antiknock compounds are used exclusively by gasoline refiners and blenders. (Cantwell, 5168) Purchasers of antiknock compounds include six of the ten largest industrial corporations in the United States, *i.e.*, Exxon, Mobil, Texaco, Chevron, Gulf and Amoco (*Fortune* rankings August 1979). (CX 220M) During the period 1974–1979, there were 154 antiknock compound purchasers, with the ten largest accounting for more than 30 percent of total purchases. (REX 324A-Z17) The larger refiners operate more than one refinery; for example, Texaco operates eleven refineries (Wilson, 3233–34),[5] Exxon operates [11] five refineries (Payne, 3503),[6] and Chevron operates seven refin-

[5] Two refineries are located on the West Coast, one on Puget Sound, and one in Wilmington, California; others are located at Casper, Wyoming; Amarillo, Port Arthur and El Paso, Texas; Tulsa, Oklahoma; Lawrenceville and Lockport, Illinois; Eagle Point, New Jersey; and Baton Rouge, Louisiana. (Wilson, 3233–34)

[6] The Exxon refineries are located at Baton Rouge, Louisiana; Baytown, Texas; Bayway, New Jersey; Benicia, California; and Billings, Montana. (Payne, 3503)

eries.[7] (REX 198A) The larger oil refineries tend to be located near the antiknock compound production facilities on the Gulf, East and West Coasts. (Lockerbie, 789; J. M. Robinson, 1020–21; Charles, 2540; McCormick 2648; Wilson, 3233–34; Payne, 3516; Fetter, 4518–19) The gasoline refineries located inland tend to be smaller ones placed near crude oil production fields. (Tunis, 297; Solomon, 2823–25; Pittinger, 4556–57)

20. The respondents also were purchasers at certain times in order to meet their TEL and TML requirements. (Altman, 1333–34, 1476, 6651–53) Ethyl and Du Pont were generally self-sufficient in all types of antiknock compounds, but from time to time Du Pont purchased additional amounts of TML from Nalco. (Altman, 1333–35) PPG purchased most of its TML requirements from Nalco and some from Du Pont. (CX 1115C) PPG produced TML only sporadically (J. M. Robinson, 981), and has not produced any TML since 1977. (Baker, 5765) Nalco generally purchased its TEL requirements from PPG (Altman, 1476), and between 1974 and 1979 was PPG's second largest customer with purchases ranging between 12 to 24 million pounds annually. (RPX 1517E) Because many customers require mixtures of TEL and TML, Nalco both purchases TEL and exchanges its TML for TEL, so that it can supply mixed fluids to its customers. (Altman, 1356, 1476–77) Similarly and for the same reason, PPG both purchases TML and exchanges its TEL for TML. (Altman, 1292, 1334–35, 1356; CX 1955Z22) Respondents also swapped needed products on a pound for pound basis. (Altman, 1478, 6652–53)

21. Under another arrangement unreacted TEL and TML were sold to refiners who, pursuant to several different financial arrangements, had the antiknock compounds shipped to another respondent, which supplied additional antiknock compounds, reacted them, and had the completed mixes shipped to the customer for use. This procedure, by which a refiner purchased antiknock compounds from one respondent and had them shipped to another respondent, is sometimes referred to as a "multileg transaction." (Altman, 1423, 6643–44) [12]

D. *How Lead-Based Antiknock Compounds are Sold and Shipped*

1. General Character of Sales

22. Testimony by respondents' officials estimated that Ethyl had sales agreements with roughly half of its lead antiknock customers (Gill, 4720); Du Pont sold about half of its lead antiknock volume pursuant to sales contracts (Tunis, 357–58; McNally, 2116); PPG sold 15%–20% of its total lead antiknock sales volume pursuant to its

[7] The Chevron refineries are located at Richmond, El Segundo and Bakersfield, California; Salt Lake City, Utah; El Paso, Texas; Perth Amboy, New Jersey; and Pascagoula, Mississippi. (REX 198A)

standard form contract (Fremd, 1698–1700); and Nalco had between 30 and 40 lead antiknock customers, but it had contracts with fewer than 10 of these. (Altman, 1255–56) There were other contractual arrangements between respondents and their customers. For example, there were contracts of a continuing nature between PPG and Shell (CX 1167), PPG and Amoco (CX 1165; J. M. Robinson, 1090–91), PPG and Mobil (RPX 7), Nalco and Chevron (RNX 1289), Nalco and Union (RNX 1583), and Ethyl and Exxon (CX 1792).

23. Contracts used by the respondents with their antiknock customers were usually signed to cover a year's requirements and they called for a fixed minimum/maximum quantity to be purchased. (REX 6) The minimum amounts stated in the sales agreements were not regarded by either the antiknock suppliers or their customers as firm commitments and the volume requirements were not rigidly enforced. (Tunis, 357; J. M. Robinson, 1025–26; McNally, 2116, 2228–29; Charles, 2605; McCormick, 2718; Steen, 3493; Dana, 4474–76; Fetter, 4526–27; J. A. Robinson, 5349; *see* CX 915, 1267A, 1268A, 1549B; REX 6A-Z136) For instance, PPG's contracts were "more a production forecast than a rigid contract." (J. M. Robinson, 1026) Du Pont used its contracts to get estimates of amounts the customer would purchase in a calendar year. (Tunis, 357) As a result, customers often failed to purchase the minimum amount specified in their antiknock contracts. (*Compare* REX 6 with REX 324) Respondents, however, were alert to remind the refiners that they were not purchasing the amounts specified in the contracts, and continuous sales efforts were directed at assuring that the supplier would get the business which had been committed under the contracts. (RDX 193; RNX 1545–48, 1539) Some refiners awarded business to each supplier on a percentage basis. (Lockerbie, 795) These percentages, like the estimated poundage specified in the contracts, were not rigidly adhered to. (Tunis, 357; CX 1100D; RNX 1543, 1546–47; RDX 10B) Respondents' sales representatives, however, made every effort to assure that each supplier got its promised percentage or more. (CX 1075B; RNX 1543–45; RDX 70A, 193) Refiners were willing to commit significant volumes of business in exchange for direct price concessions. (Miller, 1992–94; McCormick, 2648–54; Solomon, 2814–15; Wilson, 3197–201; Payne, 3522; CX 1584B, 1588B) Nalco had a small sales force which made frequent customer contact more difficult. (CX 1956L; Altman, 1391–92) Ethyl, [13] Du Pont and PPG with larger sales forces were able to have frequent customer contact, even every day. (Tunis, 885; REX 295D)

24. [***]

25. Refiners have limited facilities for storing lead antiknock compounds and they maintain inventories of about 10 days supply. (J. M.

Robinson, 1078; Charles, 2525; Fetter, 4516) They also do not wish to store large quantities of lead antiknocks because of their toxic and explosive nature (Pittinger, 4571–72), and the cost associated with maintaining a large inventory. (Charles, 2525; Solomon, 2828, 2833; McCormick, 2664–65) Therefore, refiners rely on regular delivery from respondents to assure a supply of antiknock compounds. (J. M. Robinson, 1078) Under the contractual or percentage arrangements which the respondents have with their customers, a large number of individual transactions take place. For instance, in 1977, Ethyl alone had 4,856 separate transactions with its customers. (CX 32A-Z117)

26. Multiple sources of supply are also important to lead antiknock customers. (Charles, 2547; Solomon, 2853) Therefore, almost all the lead antiknock customers buy from at least two suppliers and some buy from all four. (Tunis, 241–42; Park, 1862, 1876; Charles, 2546–47, 2569–71; McCormick, 2636–37, 2699, 2754–55; Wilson, 3259; Shouse, 2869, 2871; Dana 4465; Fetter, 4506–07; Pittinger, 4550; J. A. Robinson, 5349; RDX 324; REX 324A-Z17)

27. Refiners often would increase or decrease an individual supplier's share of their requirements. (REX 324A-Z17; CX 882; RPX 1335). Refiners exerted pressure on lead antiknock suppliers for lower prices, pressing for explanation or recission of price increases (CX 1175F, 1225, 1229, 1231), seeking competitive bids (CX 1228; Wilson, 3202–03; Steen, 3392–94, 3404; F. 28–30, 152–155), threatening to shift business (CX 1231A-B), and negotiating for price discounts or other preferential treatment. (Wilson, 3203; Steen, 3404; CX 1310A, 1312, 1949; F. 156) Refiners frequently sought below-list prices. (J.M. Robinson, 1055) Refiners awarded additional business as a reward to a supplier who undercut a rival's list [14] price increase and as punishment to the supplier which first raised list prices. (Tunis, 398–99, 450; Wilson, 3305; RNX 1526; RPX 50B) Respondents have recognized that their large refinery customers have exerted pressure on suppliers to keep prices lower and competitive. (Lockerbie, 827–28; Glassman, 6100–01)

2. Bid Requests

(a) *Exxon*

28. Exxon solicited bids in 1975 for its 1976 antiknock compound business. (Steen, 3379–80, 3401–07) Each respondent was notified of the cancellation of existing contracts and the request for innovative pricing for Exxon's 1976 antiknock requirements. (CX 914, 1094A-C, 1413, 1745, 1949; Altman, 1369–71) Exxon requested pricing proposals such as an F.O.B. manufacturing-site pricing option, a volume-related discount option, an option to evaluate services separately, a weight

adjustment on tankcar loads, and a long-term contract arrangement with or without price escalators. (J. M. Robinson, 1059; Steen, 3396–97, 3401–07, 3423–36, 3480; Payne, 3511–18, 3522–28, 3539–40; CX 620, 631, 914, 122A, 1313, 1323, 1746, 1757, 1914, 1932A, 1949) Mr. W. C. Steen, a buyer for Exxon, testified that his "primary objective [in soliciting bids] was to try to create a competitive atmosphere" similar to that existing in the market for other chemical products that Exxon purchased. (Steen, 3403) Nalco, PPG, Ethyl and Du Pont responded to the bid request with their list prices. (Altman, 1369–71; Steen, 3418–20; CX 634, 636A-B; *see* F. 152)

In the fall of 1976, Exxon again requested bids from each of the respondents for its 1977 antiknock compound business. (Steen, 3423–27; CX 631A-B, 632, 1103, 1222A-B, 1373, 1750, 1751, 1956Z87) Du Pont, Ethyl and Nalco responded with list price bids. (CX 630; Altman, 1373; Miller, 1959–60; Steen, 3396, 3495) PPG, which had been excluded from Exxon's 1976 antiknock business, responded with a list price bid and an offer of a special service, which Exxon declined. (Steen, 3424–28; CX 1222; RPX 1517C; *see* F. 152)

Exxon solicited bids again late in 1977 for 1978 antiknock supplies. Again all respondents responded with list price bids. (Altman, 1373; Steen, 3428, 3431; CX 1320A-C, 1755; *see* F. 152)

In 1978, Exxon requested bids for its 1979 antiknock business, this time requesting bids on its entire needs, or simply its needs at the Baytown refinery, the world's largest refinery, located in proximity to antiknock facilities of each respondent. (Payne, 3522–27, 3530; Bonner, 5880) Each producer again quoted list prices with no separate quotation for Baytown. (Payne, 3528–31, 3538; CX 395A-C, 396A-B, 492H, 1081A-E, 1418A-B, 1571A-G) PPG's reply went beyond previous [15] responses, but was rejected "because no price concession was made." (Payne, 3531–37; CX 1273; *see* F. 152)

(b) *Texaco*

29. In 1975, Texaco requested bids for its business from each of the respondents. (CX 878A-C, 879, 1287A-C; *see also* Wilson, 3196–203, 3229–32; REX 948) The Texaco request asked for the option of a volume discount and a price exclusive of all services or, in the alternative, services unrelated to health and safety. (Wilson, 3192–98, 3327–28, 3245; CX 896, 898, 1194, 1713C-D) Each respondent ultimately responded to Texaco with a list price quotation. (Tunis, 426–29; Lockerbie, 765–66, 773–75, 778, 851; CX 903A-B, 1287A-C, 1713A-D); *see* F. 153)

(c) *Sun*

30. In 1973 and 1975, Sun requested bids for its antiknock com-

pound requirements from each of the respondents. Sun solicited volume discounts, F.O.B. manufacturing-site pricing, and pricing exclusive of services. (McCormick, 2648–54; CX 882A-B, 899, 1227, 1383, 1384, 1584, 1588, 1741, 1742A-B) Each respondent replied to the Sun requests by quoting list prices. (Tunis, 256–69; Lockerbie, 781, 851; McCormick, 2651–52, 2653, 2656–58; CX 1228A-B, 1385, 1584A-B, 1587A-B, 1588, 1692, 1691A-B, 1733; *see* F. 155)

3. Shipping

31. Because of their high toxicity, lead-based antiknock compounds require expensive tankcars and storage tanks specially designed and insulated to assure maximum protection against explosion or exposure to humans. Such tankcars and storage tanks cannot be used for purposes other than the transportation and storage of lead antiknocks. When no longer used for these purposes, such containers and any attachments which had contact with lead fluids are decontaminated, cut up and destroyed. (Tunis, 2197; Werling, 3697; White, 5961–62, 5973) Some small amounts of lead antiknocks compounds are shipped in 55–gallon drums and tanktrucks. (Gill, 4778; Krippahne, 5052)

Lead antiknock compounds are shipped in railroad tankcars owned or leased by each respondent. (Krippahne, 5148; Werling, 3697) In a few instances tankcars are "trip-leased" to a specific customer, which means that the car is loaded by a respondent and sent to a particular customer, unloaded, returned to the supplier, and loaded again for the same customer. The car at times will not be unloaded promptly, but held at the refinery. Under the trip-lease arrangement, no demurrage charge is assessed against the refiner. (Altman, 1545, 1547)

Respondents also utilize rail side tracks around the country where loaded tankcars are maintained as a storage depot **[16]** to enable respondents to respond quickly to a customer's request for lead antiknock compounds. (Tunis, 262; Altman, 1293; Krippahne, 5084, 5086)

IV. MARKET CHARACTERISTICS

A. *Production Methods and Costs*

32. Ethyl, Du Pont and PPG utilized similar production methods involving chemical reactions with sodium and lead to produce lead-based antiknock compounds. (Tunis, 86; J. M. Robinson, 1110; Altman, 1308–09) Lead is combined with sodium to form a lead-sodium alloy, which is then combined with ethyl cloride to form TEL and sodium chloride. The TEL produced is then washed, aerated and filtered, and eventually mixed with scavengers and other additives. (Baker, 5754; CX 1115C-D) TML is made in a similar manner except

that methyl chloride is used instead of ethyl chloride. (Baker, 5756) Nalco uses a different production process from that used by the other respondents. (Altman, 1309) Nalco's system produces lead in solution in an electrolytic cell and uses magnesium rather than sodium as a catalyst. (Altman, 1401; Carlton, 7068) Nalco developed this process through a joint research effort with Amoco which began in 1959. (RNX 1586) Du Pont produced TEL by each of the batch and continuous processes, principally the continuous one, and TML by the batch process. (Tunis, 85; CX 1955K) Ethyl and PPG produced antiknock compounds by the batch process only. (CX 1954N; J.M. Robinson, 1081–82) Nalco's manufacturing process was a continuous one. (Hay, 3805; Carlton, 7069–71)

33. The largest part of the cost of manufacturing lead antiknocks consists of raw materials. (Gill, 4732) Most—about 80 percent—of the costs of producing lead antiknocks are variable. (Gill, 4732–33; Baker, 5805–06) For instance, pig lead prices (pig lead constitutes approximately 40 percent of the finished antiknock fluid (F. 5)), rose 7 cents a pound in 60 days in 1978. (RPX 1400) Ethyl produced a portion of all the raw materials it needed to manufacture antiknocks, except for pig lead. (CX 1733B, 1747A, 2002–Z74; *see* Fremd, 1609) Du Pont produced all its necessary raw materials except for pig lead and scavengers. (CX 597N; *see* Fremd, 1609–10) The only raw material produced by PPG was ethyl chloride. (CX 115C; Fremd, 1609–10) Unlike either Du Pont or Ethyl, PPG also had to buy sodium. The sole source for sodium during the 1970's was Du Pont; Ethyl would not sell sodium to PPG. (CX 1279B; Fremd, 1722–23, 1610) Nalco did not produce any of the raw materials it needed to produce antiknock compounds. (CX 1330A-B; Fremd, 1610)

34. Because Nalco uses an electrolytic process, unlike other respondents, it had different [***] production costs. (Tunis, 86–87; Altman, 1308–09; RNX 714A-B, 735A-C; [17] RDX 135H) [***] Between 1973 and 1977, the cost of magnesium, a component of Nalco's process, escalated faster than the cost of sodium, which was used by the other manufacturers. (Altman, 1310, 1446; RNX 258, 714A-B, 735A-C, 747A-K) Nalco's cost comparison memorandum prepared for customers in April 1977, for example, compared Nalco's costs and profits for the years 1973 and 1976. During the intervening period Nalco's raw material costs increased 108% and the average selling price of antiknock increased 61%. (RNX 11B-C, 258) Between 1973 and 1977, the price of magnesium increased 173%. (RNX 12D) Between 1974 and 1977 various utilities, also a significant cost with Nalco's electrolytic process, increased 320% (electricity) and 341% (steam). (RNX 12E)

35. Ethyl, Du Pont and PPG could generally estimate the manufac-

turing costs of each other because they used similar processes. The respondents also were aware that Nalco's raw material and manufacturing costs were different from their own, [***] (Tunis, 85–87; Altman, 1308–09; Fremd, 1609–10; McNally, 2284–85; Baker, 5835–36; CX 1952Z100–Z101; RDX 135H; RNX 1198) TML, Nalco's principal product, was also more expensive to manufacture than TEL. (Fremd, 1748–49)

36. Du Pont's continuous process was more efficient and less costly to operate than any available batch process based on the lead-sodium reaction that Ethyl, PPG and Du Pont employed. (Tunis, 85–86; RDX 135H, CX 923I) Du Pont believed its manufacturing costs were also less than Nalco's manufacturing costs, but on a par with Ethyl's. (Tunis, 84–87; Altman, 1308–11; CX 2211)

37. Since five of the largest refiners owned Octel, a foreign antiknock compound producer, it can be assumed that these refiners had a good understanding of the basic costs involved in the antiknock compound manufacturing process. (*See* F. 104) Ethyl stated that the large refiners were able to accurately calculate the manufacturing costs of lead antiknock compounds. (CX 394Z2)

B. *Production Capacity*

1. Ethyl

38. Ethyl had two lead antiknock compound manufacturing facilities: one in Baton Rouge, Louisiana and one in Houston, Texas. (CX 591I-L, N-Z13; F. 1)

Ethyl's manufacturing department estimated the following production capacity for all lead-based antiknock compounds at these facilities: [18]

Year	Baton Rouge	Houston	Total
1974	346	210	556
1975	320	200	520
1976	320	200	520
1977	310	165	475
[***]	[***]	[***]	[***]

(CX 591K; Day, 594, 646).

Ethyl's annual production in its U.S. facilities in 1974-1978 and the first five months of 1979 was:

Year	Total Production
1974	511 million lbs.
1975	388 million lbs.
1976	433 million lbs.
1977	432 million lbs.
[***]	[***]

(CX 591J, Z9-Z11).

Ethyl had the following excess capacity in the years 1974-1979:

1974	45
1975	132
1976	87
1977	43
[***]	[***]

These figures represent the difference between Ethyl's actual production and its nominal capacity. (CX 591Z9-Z11; REX 334B, 335B)

Ethyl had available autoclave capacity equal to 165 million pounds per year in three separate closed facilities at Baton Rouge. These facilities were F building, with an annual capacity of 45 million pounds, and A and E buildings, each with 60 million pound annual capacities. (REX 335B; Day, 582–84) Each of these facilities was initially closed in the mid–1960's and had its equipment drained, washed and covered with a nitrogen blanket for protection. (CX 1954Q-X; Day, 578–821) F building was reopened in 1967 and again in 1973. (Day, 580–81; REX 335B) The 1973 reopening cost $700,000. (CX 1954Z13, Z26) In 1974–75, F building was shut down (CX 1954Z15), and reopened in 1976. (CX 1954Z21) A and E buildings remained idle and were begun to be dismantled in 1977 and 1978. (CX 1954U)

Between 1974 and 1978, the Baton Rouge capacity was decreased by 95 million pounds from 375 million to 280 million pounds because Ethyl did not install environmental equipment for F furnace. (REX 335D-G, 336D-E; CX 1954Z23–Z24) In late 1975 Ethyl estimated that that year's sales would be "roughly [19] 75% of peak sales a few years

ago" and that each industry member would have 25% excess capacity the following year, 1976. (CX 394K, Z2; Day, 591)

Ethyl's capacity to produce lead antiknock compounds was reduced from 1975 to 1978 in part because of limitations imposed on the operation of its furnaces by the Louisiana Air Control Commission and the Texas Air Control Board, and because the federal clean air standards required the installation of high energy scrubbers and tails gas burning systems. (Day, 576, 656–57; REX 335F-I; CX 1954Z3, Z5, Z21–Z24, Z27–Z28) However, through restoration and debottlenecking capacity at its Houston facility, Ethyl could have increased annual production capacity there by 75 million pounds, from 165 to 240 million pounds, at a cost of $10 million. (CX 497E; Day, 593–98)

On July 1, 1980, Ethyl closed its Houston lead antiknock compound manufacturing plant. (Day, 622–23)

2. Du Pont

39. Du Pont had two lead antiknock compound manufacturing plants during the period 1974–1979, one located in Deepwater, New Jersey, and one in Antioch, California. Du Pont also had an antiknock compound blending facility at Beaumont, Texas. (Tunis, 40–41, 303–04; F. 2)

In 1975 Du Pont closed two plants. The first, a TML plant, with a 71 million pound annual capacity, was closed down on January 1, 1975. It could have been kept operational at a cost of $750,000 to comply with environmental regulations. (CX 1847D, 1955P-Q) The second plant, with a 65 million pound annual capacity, was closed in April 1975 but reopened in August 1976. (CX 1847D, 1955W-Y) The second plant then was closed about a year later, in September 1977 (CX 1847E), and maintained in "standby" condition. That building was taken off standby (but kept intact) in March 1978. (CX 1955Z7–Z8) These two plants represented 25% of Du Pont's total capacity. (CX 969L) To restore one of the units to active production would cost approximately $2 million and would take about one year. (CX 1955Z30)

Du Pont believed that demand was substantially less than the industry's installed production capacity. (Tunis, 88–89) In early 1974 Du Pont projected there would be "excess manufacturing capacity industrywide" as the market declined (CX 920H; Tunis, 91–93), and by late 1974 or early 1975, Du Pont believed there was already excess industry capacity and was concerned that it would increase because of reduced demand. (CX 924Q, 960D; Tunis, 94–95)

At the end of 1977, Du Pont had had "excess production capacity available" for "the past several years." (CX 926J, 1653A; McNally,

2139) This excess capacity continued until at least mid–1978. (CX 1113Z75) Du Pont had 100 and 80 million [20] pounds of excess operational capacity on an annualized basis for 1978 and 1979, respectively. (CX 1113Z92–Z94) As Du Pont saw demand declining it decreased its operational capacity. (Tunis, 89–90, 93; CX 922H-I, 923B, 969L, 1955K-R, W-Z) In early 1979, Du Pont announced that it would close its lead antiknock compound production facility in Antioch, California, in October 1980, an advance notice of almost twenty months. (CX 1955Z28)[8]

In its "Organic Chemicals Department Annual Report" dated December 1975, Du Pont noted that its sales volume was 84 percent of its available capacity in 1974 and 94 percent in 1975. (CX 922K) In the annual report dated December 1976, Du Pont noted that it had used 89 percent of its available capacity in 1975 and 99 percent in 1976. (CX 923E)

3. PPG

40. PPG has one lead antiknock production facility at Beaumont, Texas, where it has produced lead antiknock compounds since 1961. (J. M. Robinson, 965; F. 3) PPG's maximum capacity to produce was rated at about 113 million pounds of TEL. To meet that rate, all 24 autoclaves in the West Plant and 8 autoclaves in the East Plant had to operate at maximum output and could produce TEL only. PPG could produce about 3.5 million pounds of TML by switching the two specially adapted autoclaves from TEL production to TML production; but that resulted in a direct loss of over 2 pounds of TEL capacity for every pound of TML production, and an additional loss of production for about a week from the two autoclaves being switched to TEL. As a result, PPG's maximum rated capacity to produce TEL and TML together was approximately 105 to 106 million pounds of TEL and 3.5 million pounds of TML. (Baker, 5756, 5762–66, 5829–33)

From 1974 to 1976, PPG did not have any significant excess capacity. (J. M. Robinson, 1078) From June 1976 through the first few months of 1977, PPG expected 100% production. (RPX 1341, 1345; Baker, 5829) A PPG market analysis indicated that PPG operated at 86% capacity in 1977, 100% in 1978, and 88% in 1979. (CX 1278G; Baker, 5829) Both production and capacity were reduced in 1978, and PPG terminated lead antiknock production in its 8 East Plant autoclaves in August 1978. (J. M. Robinson, 1015; Baker, 5829) In response to unexpectedly high demand toward the end of 1978, however, the East Plant was put back in operation beginning in late April 1979. Both sodium and lead were in short supply in 1979, delaying and

[8] A copy of an article in *The Wall Street Journal* dated May 1, 1981, attached to Du Pont's Reply Brief, states that Du Pont plans to close its antiknock facilities at Antioch, California, by August 1, 1981.

raising the [21] cost of the East Plant start-up. (RPX 1429; Baker, 5775–76) The East Plant was closed permanently in December 1979. (Baker, 5776) [***]

PPG has not, since approximately 1973, authorized spending for plant modernization or improvement, except with regard to environmental protection. (Baker, 5772)

4. Nalco

41. Nalco has produced lead antiknock compounds at one facility in Freeport, Texas, since it entered the market in 1964. (Altman, Tr. 1401–02, 1477; F. 4) Its production has been limited to TML. (Altman, 1477)

In the latter part of the 1960's Nalco expanded its production capacity 50%. (Altman, 1401–02) Nalco's daily capacity during the 1970's was at least 375,000 pounds, or approximately 137 million pounds per year. (Altman, 1398–99, 1517–18; CX 1527H) Nalco's capacity and actual production were as follows:

	1974	1975	1976	1977	1978	1979[9]
Capacity	137	137	137	137	[***]	[***]
Production	119[10]	105[11]	118[12]	122[13]	[***]	[***]
Excess Capacity	18	32	19	15	[***]	[***] [22]

Nalco's production decreased in late 1974 and early 1975 because of a raw material shortage (methyl chloride) which resulted in lost production. (RNX 17A-B, 140A-B, 353) Nalco returned to an increased percentage of production capacity through 1977. (Altman, 1312–14, 1400) Nalco has not shut down any production facilities, although it encountered reduced production capability because of state and federal pollution requirements. (Altman, 1317, 1402)

C. *Demand*

1. Inelasticity of Demand

42. Price elasticity or elasticity of demand measures the responsiveness of the quantity demanded of a particular product to the change in the price of that product. If demand is elastic, revenue decreases when price increases; and if demand is inelastic, revenue increases when price increases. When revenue stays constant at higher or lower

[9] Capacity and production figures for the first four months have been annualized.

[10] CX 1780D. Annual production of lead-based antiknock compound fluid is calculated by dividing the annual lead alkyl produced by the percentage it represents in the finished fluid.

[11] CX 1779A-X.

[12] CX 1778A-X.

[13] CX 1777A-X.

[14] CX 1776A-X. [Referenced data *in camera.*]

[15] CX 1775A-H. [Referenced data *in camera.*]

prices, demand is said to have unitary elasticity. (Glassman, 6255–56; Markham, 6781–82)

The demand for antiknock compounds is inelastic. (Hay, 3921, 3998, 4001; Mann, 5429; Glassman, 6257; Markham, 6782–84, 6832; Carlton, 6960) Because antiknocks are more efficient and economical than other methods of increasing the octane rating of gasoline, increases in price would have resulted in relatively small reductions in consumption. (Lockerbie, 742; Cantwell, 5205–06; RDX 332H-I; CX 1953Z279–Z80; F. 14–15) A study by Pace Engineering concluded that in 1975 lead antiknock compound prices could be increased 20% from 1974 levels without causing a reduction in consumption. (Tunis, 62–63; CX 972B) In the mid–1970's, Ethyl calculated that each 10% increase in price would result in only a 4% volume or consumption reduction. (CX 1953–Z279–Z80)

2. Decrease in Demand

43. Most automobiles manufactured since 1975 have required engines with catalytic converters which cannot burn leaded gasoline. (Tunis, 46–48; Werling, 3608) As older, lead-tolerant vehicles are retired, the market for lead-based antiknock compounds will shrink. (Werling, 3608) The following table by Du Pont indicates predicted sales of leaded gasoline for the remainder of this decade:

	Sales of Leaded Gasoline (billion gallons)	Total Gasoline Market (billion gallons)
1981	48.5	107.6
1985	26.3	103.2
1990	15.4	92.0

(Cantwell, 5233; CX 2007G). [23]

Present EPA lead-based antiknock compound usage regulations apply on a poolwide basis. The permissible amount of lead is a function of total amount of gasoline sold and as the unleaded volume grows, lead concentration in leaded gasoline will increase. (Werling, 3608–09; Cantwell, 5196) Domestic demand for antiknock compounds is estimated to decline to 400 million pounds for 1980 and is projected to be 300 million pounds in 1981. (Koehnle, 4628–29; CX 1219E) The market may stabilize in the 300 million pounds yearly range if heavy-duty trucks are exempt from EPA lead restrictions. (*See* F. 45)

During the period 1974–1979, there was some uncertainty in the demand for lead antiknocks. (Robinson, 1013–16; CX 201A, 1952Z51, Z59, 199G) In 1974 and 1975, the antiknock producers generally believed demand would decline because of EPA regulations. (CX 199A, E, 201B, 394Z2, 920I, 922J, 923C, 1928F) Demand measured in terms

of sales of fluid pounds did decline between 1976 and 1979 by approximately 24%. (CX 406R, 1931B, D; REX 324Z17). The decline between 1979 and 1980 (on an annualized basis) was approximately 42%. (REX 324Z17)

D. *Government Regulations and Their Impact on the Market*

44. The EPA, pursuant to the 1970 amendments to the Clean Air Act, promulgated regulations to reduce the quantity of hydrocarbon emissions from automobiles, beginning with the 1975 model year (Pub. Law 91–604 Section 6(a), 84 Stat. 1690, 42 U.S.C. 1857 f–1(a), (b) (1976)). To meet the requirements of these regulations the automobile manufacturers were required to install catalytic converters on all new cars built beginning in 1975. Such converters require the use of unleaded gasoline. The regulations required all gasoline refiners to market at least one brand of lead-free gasoline, beginning in July 1974 when 1975 model cars and light trucks were first marketed. (40 C.F.R. 80.22 (1979)) These regulations were upheld in *Amoco Oil Co.* v. *EPA,* 501 F.2d 722 (D.C. Cir. 1974).

The EPA issued general lead phasedown regulations in November 1973. The initial regulations contemplated that the permissible amounts of lead in motor gasoline would be reduced in five steps ending in January 1979 when the allowable standard would be .5 gram of lead per gallon of finished gasoline in the total gasoline pool. (38 FR 33,734 (1973)) However, there were delays in the anticipated implementation of the phasedown regulations:

November 28, 1973	EPA promulgated its final regulations requiring that the amount of lead in the total gasoline pool be phased down. These regulations were to take effect on January 1, 1975, and the final step in the phasedown was to take place January 1, 1979, when **[24]** the pool would contain .5 gram of lead per gallon. (38 FR 33,734)
December 20, 1974	The United States Court of Appeals ordered the regulations set aside, with one judge dissenting. The majority and dissenting opinions were issued January 28, 1975. (*See Ethyl Corp.* v. *EPA,* 541 F.2d 1, 11 (D. C. Cir. 1976) (en banc).)
February 20, 1975	EPA formally suspended enforcement of the phasedown regulations as a result of the panel's decision. (40 FR 7,480)
March 17, 1975	EPA's petition for rehearing en banc was granted and panel decision was vacated. (*See* 541 F.2d at 11.)
April 18, 1975	EPA announced that it would continue suspension of the phasedown regulations pending the en banc decision. (40 FR 18,217)
May 20, 1975	The case was reargued en banc. (541 F.2d 1)
March 19, 1976	EPA regulations were upheld by the Court of Appeals en banc. (541 F.2d 1 (D.C. Cir. 1976))

March 24, 1976	EPA lifted suspension of the phasedown regulations with regard to certain reporting requirements. General implementation continued to be suspended pending the outcome of requests for Supreme Court review. (41 FR 13,984)
June 14, 1976	*Certiorari* was denied by the Supreme Court. (426 U.S. 941 (1976))
July 2, 1976	EPA stated that it would put the original phasedown schedule into effect unless comments were received demonstrating that compliance would not be feasible. (41 FR 28,352-53) **[25]**
September 24, 1976	EPA adopted a new schedule for implementation of phasedown regulations. On January 1, 1978, the pool average was to be .8 gram per gallon and on October 1, 1979 it was to be .5 gram. A refinery could receive a suspension of the .8 gram requirement, however, if it showed that it was making good faith efforts, such as procuring necessary equipment, to meet the October 1, 1979 deadline. (41 FR 42,675-77)
January 1, 1978	EPA's .8 gram per gallon standard was implemented. Refiners were permitted a suspension of the .8 gram requirement if good faith effort was being made to meet the .5 gram requirement scheduled for October 1979. Refiners with over 75% of the nation's gasoline refinery capacity were granted suspensions. (44 FR 53,144)
June 8, 1979	EPA suspended the .8 gram of lead per gallon requirement for all refiners for the period June 8, 1979 to October 1, 1979. In addition, EPA proposed delaying the October 1, 1979 effective date for the .5 gram of lead per gallon on a poolwide basis for one year because of fears of gasoline shortages. Refiners would be able to continue the general .8 gram standard (or more in certain circumstances) after October 1979 if certain requirements were met. EPA also noted that it might suspend some of the prerequisites for qualifying for the .8 gram per gallon standard. (44 FR 33,116-18)
September 12, 1979	The regulations proposed on June 8, 1979 were adopted (44 FR 53,144). A minimum poolwide lead usage of .8 gram of lead per gallon was permitted in each of the first three quarters of 1980 when all prerequisites for qualification were suspended. (45 FR 14,854-55; 45 FR 37,195-96; **[26]** 45 FR 55,134-35) Certain small refiners were allowed to use up to 2.65 grams of lead per gallon. These small refiner regulations are effective through at least October 1, 1982. (42 U.S.C. 7545(g) (1)-(4) (1979); 44 FR 46,275)
October 1, 1980	The 0.5 gram per gallon general standard went into effect. (40 C.F.R. 80.20 (1979)) Small refiners continue to receive the waivers noted above.

45. EPA has issued regulations which require a reduction in the emission levels of trucks as well as of automobiles. Emissions of light trucks were generally governed by regulations similar to those applicable to automobiles. These regulations were effective in July 1974 when 1975 models were first marketed, and today most new light trucks use catalytic converters that do not tolerate leaded gasoline. (40 C.F.R. 86.077–8 (1979)) Regulations affecting heavy-duty trucks were first proposed in February 1979 and, after a change in the implementation schedule, were to be effective with trucks manufactured for the 1984 model year. (44 FR 9,464; 45 FR 4,136) It was expected that manufacturers would install catalytic converters to meet those heavy-duty truck requirements. (44 FR 9,471) In April 1981, however, the EPA gave notice of its intention to revise permissible emission levels for heavy-duty trucks so that they would not have to use catalytic converters and, therefore, be able to run on leaded gasoline. (46 FR 21,628) Implementation of heavy-duty truck regulations are currently the subject of litigation in the Court of Appeals for the D.C. Circuit. (*See Motor Vehicle Manufacturers Ass'n* v. *EPA,* No. 80–2410 (D.C. Cir., filed November 20, 1980); *Motor Vehicle Manufacturers Ass'n* v. *EPA,* No.80–1290 (D.C. Cir., filed March 13, 1980)).

E. *Market Shares and Firm Size*

1. Concentration

46. The respondents are the sole domestic producers of lead-based antiknock compounds. (F. 18) Using the four-firm concentration ratio, which is the share of total sales accounted for by the four largest firms in the industry, the lead-based antiknock compound industry has the highest possible concentration—100%. (Hay, 3783–84; Markham, 6776–77; *see also* CX 1975I) [***] **[27]**

2. Sales by Respondents

47. From 1961 to 1974, respondents' shares of the entire lead antiknock market changed. PPG entered the lead antiknock market in 1961. (Fremd, 1734) Between 1961 and 1974, PPG's share of the lead antiknock market went from 0% to approximately 17%. (REX 324 Z17) Nalco entered the lead antiknock market in 1964. (Altman 1387) Between 1964 and 1974, Nalco's share of the lead antiknock market went from 0% to approximately 12%. Thus, between 1961 and 1974, Ethyl's and Du Pont's combined share of the domestic antiknock market fell from 100% to approximately 70%. (REX 325Z17)

48. Between 1974 and the first six months of 1980, the respondents made the following total sales of antiknock compounds to refiners measured by fluid pounds, as shown on Appendix C.

3. Shift in Market Shares of Individual Customers

49. Refiners often shifted business among respondents. Between 1974 and 1980, each respondent's share of some lead antiknock customers' purchases varied substantially. [***] **[28]** [***]

Stability of market shares is one index of the amount of competition in an oligopoly. Volatility of market shares is evidence of competition among rivals for the business of individual customers, while market share stability is consistent with limited competition. (Glassman, 6078–80; Markham, 6801–03, 6874)

F. *Barriers to Entry*

50. PPG entered the lead-based antiknock compound market in 1961. The original company, Houston Chemical Company, negotiated supply contracts with Amoco and Mobil prior to market entry. According to one PPG official, Houston Chemical "basically needed the Amoco contract and the Mobil contract to arrange financing for the company, in other words, to get the company started as such." (J. M. Robinson, 1004, 1092–93; *see also* Glassman, 6018) Houston erected its antiknock manufacturing plant next to Mobil Chemical Company. The Mobil arrangement provided for PPG to purchase ethylene from Mobil Chemical and Mobil to purchase antiknock compounds from Houston. (Robinson, 1009–10) Nalco entered the lead-based antiknock compound market in 1964, with an electrolytic process developed as a result of a joint research effort with Amoco which began in 1959. (RNX 1586A-Y; Altman, 6624–25) Amoco also provided Nalco with technical and marketing information to help Nalco enter the market. (RNX 1587A-K)

From 1964 throughout the 1970's there were no new entrants into the lead-based antiknock compound industry and the possibility of entry seemed low. (Tunis, 218–20, 368–70; Hay, 3784, 3924; Mann, 5431–32; Markham, 6779; Carlton, 6960) Government regulation of lead-based additives to gasoline has made it unlikely there will be future entrants or expansion by current producers. (Day, 549–51, 554, 631; Baker, 5765; Markham, 6779; Carlton 6960; CX 922J, 923C, 960P) **[29]**

V. PRICING

A. *Generally*

51. Each respondent sells its standard antiknock compounds pursuant to a list price which includes the cost of delivery. (F. 123; CX 600–617, 1646–1647, 1658–1660) The lead-based antiknock compound industry was subject to price controls between August 15, 1971 (36 FR 15,727, *et seq.*) and February 1, 1974. (39 FR 4,064, *et seq.*) The first

industry-wide price increase after the elimination of price controls on this industry was announced in early February 1974. (CX 342, 1970A; F. 53)

B. *TEL and TML Pricing*

52. In 1960 when TML was first sold, it was sold at a list price which was approximately 30% higher than the list price of TEL. During the period from 1960 to 1974 the TEL price rose from 35¢ per pound to 41¢ per pound, while the TML price declined from about 48¢ per pound to 43¢ per pound. (CX 1824B) As of May 25, 1978, TEL was priced at 73.62¢/lb. and TML was priced at 76.14¢/lb. On May 26, 1978, Ethyl initiated a list price reduction of TML, reducing its list price by 2.52¢/lb. to 73.62¢/lb. (Fremd, 1737–38, 1743; McNally, 2232–33; CX 478, 1952Z102–Z104, Z157) Du Pont, PPG, and Nalco matched Ethyl's TML price reduction. (Fremd, 1740; CX 1066A-B, 1247, 1516A) This reduction in the price of TML equalized the list price of TEL and TML for the first time. (*see* F. 53)

Shortly thereafter, on June 30, 1978, Du Pont initiated another TML list price reduction when it reduced its TML price 2.52¢/lb. below its competitors' prices. (Lockerbie, 812; Fremd, 1740–41; McNally, 2232–34, 2237; RDX 238A-B; CX 1113Z2) Ethyl, PPG and Nalco matched Du Pont's 2.52¢/lb. price reduction. (Fremd, 1741; CX 393, 1248) This reduction in the TML list price for the first time placed the TML list price below the TEL list price. (*see* F. 53)

PPG initiated another list price reduction on July 5, 1978, when it lowered its list price for TEL by 2.52¢/lb. (Lockerbie, 812; J.M. Robinson, 1032–33; Fremd, 1592, 1742; McNally, 2238; CX 1261) As a result of this list price change, the list price differential between TEL and TML disappeared. (CX 1970A-C; F. 53)

C. *List Price History of TEL and TML: 1974–May 1979*

53. Between 1974 and May 1979, there were both list price increases and list price decreases by all four respondents. Appendix D sets forth list price changes in lead **[30]** antiknock compounds between February 1, 1974 (the first list price change after price controls were lifted) and April 18, 1979 (the last list price increase prior to issuance of the complaint herein).

54. On six occasions from 1974 to 1979, respondents individually announced different list price increases. However, list prices were quickly made identical. For example, on March 1, 1977, Ethyl and Du Pont simultaneously announced price increases of different amounts. (CX 1188) The increases were in part attributable to a rise in the list price of pig lead used to make antiknock compounds. (CX 50, 938) Ethyl's March 1, 1977 announcement increased TEL and TML prices

.8¢ per pound, effective April 4, 1977. (CX 13) Du Pont also announced a list price increase on March 1, 1977 of 2.0¢ per pound to take effect April 7, 1977. (CX 813, 819A-F, 821) On March 4, Du Pont rolled back its list price increase to that of Ethyl's. (CX 939; Diggs, 2431) On March 7, both PPG and Nalco announced an 0.8¢ per pound list price increase effective April 7. (CX 1122, 1344, 1484, 1660G). On March 18, Ethyl changed its effective date from April 4 to April 7 (CX 12).

The .8¢ per pound increase announced originally by Ethyl, and adopted by all respondents, was effective on April 7, 1977. Twelve days later, on April 19, 1977, Ethyl announced a price increase of 1.8 ¢ per pound, effective May 26, 1977. (CX 16) The other respondents quickly followed. Thus, the original price increase of 2.0¢ per pound announced by Du Pont on March 1, 1977, was realized by all the respondents, plus an additional .6¢ per pound. (CX 814, 837; *see* F. 175–176)

55. There were other occasions when different list prices were announced. On February 1, 1974, the day price controls were lifted, Du Pont and Ethyl simultaneously announced different price increases. (CX 342, 349, 353, 973, 1970; Diggs, 2419–20; Werling, 3639–40) On May 14, 1975, Ethyl and Du Pont simultaneously announced different price increases. (CX 277, 278, 282, 640A-C) On December 10, 1975, Du Pont announced a price increase; on December 11, 1975, Ethyl announced a lower price increase, apparently unaware of Du Pont's previous price announcement. (CX 55, 228, 231, 255, 700, 702, 711, 1970A) On March 1, 1977, Ethyl and Du Pont simultaneously announced different price increases, again apparently without knowledge of each other's actions. (CX 13, 33, 50, 122, 814, 821, 833, 938A, 1970B)

56. On August 15, 1977, Du Pont announced a price increase. Four days later on August 19, 1977, Ethyl undercut Du Pont's price increase. (CX 19, 66, 101, 858, 1111) On December 15, 1977, Du Pont announced a price increase; on December 20, 1977, Ethyl again undercut Du Pont's price increase. (CX 80, 81, 535, 863, 868, 1113Z72, 1404) These latter pricing moves by Ethyl were stated to be attempts by Ethyl to increase its market share. (Lockerbie, 801–02; F. 145) **[31]**

57. Of the 24 increases in the price of lead antiknock compounds occurring during the period 1974–May 1979, 20 followed publicly announced increases in the price of lead; similarly, 3 of the lead antiknock price decreases during the period followed publicly announced decreases in the price of lead. (CX 50, 51, 52, 53, 54, 56, 58, 60, 139, 265, 342, 403, 432, 440, 445, 448, 455 461, 481, 485A-B, 595, 927A-B, 929A-B, 931A-C, 936A-B, 938A-C, 947A-B, 949A-B, 950A-B, 952A-B, 954A-B, 1055A-B, 1056A-B, 1059A-B, 1060A-B, 1062A-B, 1067A-B; REX 307)

D. *Off-List Price Transactions*

1. Direct Price Discounts Off List Price

(a) *Ethyl*

[***] **[32]** [***]

(b) *Du Pont*

60. Du Pont made no sales during the 1974–1979 period at a price less than list. (Tunis, 65–66, 114, 129, 411–12, 474–75; Park, 1822–23; Miller, 1990–91; McNally, 2264–65; CX 922N, 923K-L, 926T, 113Z78) Du Pont estimated that in view of its large market share, it would have required a 2.5% increase in sales volume to compensate for the loss of profits from a 1¢/lb. decrease in the price of lead-based anti-knock compounds. (Tunis, 114, 129, 411–12; Miller, 1990; McNally, 2141–42, 2166–67, 2246–47) Likewise, the December 1975 Annual Report of Du Pont's Organic Chemical Department stated:

> An alternative strategy would be attempt to hold or increase market share by selective discounting to meet competitive situations. This has been rejected because the potential earnings gain from increased shares is small compared with the risk of earnings loss through a reduction in market price which would probably result from competitive reaction. For example, a price decrease of only 4% would offset the earnings gain by increasing share from 35% to 40% of the market projected for 1980. (CX 922N)

(c) *PPG*

[***] **[33]** [***] **[34]** [***]

(d) *Nalco*

[***] **[35]** [***] **[36]** [***] **[37]**

2. Advance Sales or Forward Ordering

80. In the period after notice of a price increase, and before the higher prices became effective, customers engaged in "advance buying" by ordering more than their normal requirements during the 30-day price increase notice period. These orders normally were shipped and invoiced prior to the effective date of the new prices. (Tunis, 193–99; Lockerbie, 693–95; J. M. Robinson, 1046–47; Altman, 1470–71, 1533, 1542, 1546, 1552; McNally, 2125–28; McCormick 2707–08; Dana, 4498–99; CX 1956Z64–Z65; RDX 318) Respondents limited the amount of customers' advance purchases because of limitations on respondents' ability to produce, stockpile and deliver abnormally large amounts (Tunis, 195–200; Lockerbie, 694; J. M. Robinson, 1046–47, 1117; Koehnle, 4636–37; Gill, 4700, 4749–50; CX 1953Z93, Z95–

Z96; CX 959A); and because advance ordering delayed the effectiveness of the price increase and reduced respondents' profits. (Tunis, 194–95; Gill, 4700–01)

For a number of reasons, including for example, a shortage of tank car capacity or a desire to give a customer a temporary price break, respondents delivered (and sometimes invoiced) product at the old price after the effective date of a price increase. Only shipments invoiced and delivered after new prices became effective, and only such shipments as exceeded a normal 30–day ordering pattern, gave the receiving refiners what amounted to a price discount. (Park, 1917; Charles, 2590, 2592; Hay, 3823–24, 4308–11, 4324–25; Carlton, 6980–81, 7241–45; Markham, 6796–97) Thus, it logically can be anticipated that customers seek to take advantage of the old lower price by buying extra product at the time of a price increase, and respondents seek to maintain a limitation on such purchases.

81. Respondents' rules-of-thumb with respect to limitations on customers' forward orders serves as the basis for negotiation with customers seeking additional advance buying. Respondents often have been unable to restrict customers' advance orders to their unofficial limitations. (Tunis, 194–95, 397; Lockerbie, 694–95; J. M. Robinson, 1047–48; Altman, 1393–94, 1500, 1542, 1547–48; McNally, 2125–29; REX 186A-B; CX 1953Z94–Z95) Each respondent on occasion will accept customers' demands for additional forward purchases out of concern that one of the other respondents will fill any order that they refuse. (Tunis, 195; Lockerbie, 694, 839–40; Altman, 1502, 1542; McNally, 2128; REX 1I, 189B, 190, 191A, 911, 193, 194, 195A-B, 196B, 197, 207, 208, 209, 210, 211, 212, 213; RDX 166A-B; CX 1015) Some customers have found that they can obtain substantial antiknock fluid in advance of a price increase. (Park, 1915–17; McCormick, 2665, 2708; Dana, 4471, 4498–99; Fetter, 4516–17, 4534–35, 4537, 4543–44; REX 192; CX 1015A; RNX 1355) [***] [38] [***]

Ethyl has accepted orders for 45 days' normal supply at the old rate. (Lockerbie, 694; REX 10A, 184; CX 1953Z92, Z95–Z96) Du Pont has an "in-house guideline" to limit forward ordering to between four and six weeks' normal supply. (Tunis, 139, 194–98; McNally, 2125–29; REX 187; CX 959A) Du Pont has limited Sun Oil advance purchases. (RDX 318; McCormick, 2707–08) Du Pont's Director of Marketing until September 1977 testified that Du Pont in all cases invoiced prior to the price increase, but sometimes shipped some product after the price increase became effective. Payment was based on invoice date, not shipping date. (Tunis, 194, 507)

PPG has accepted orders for more than a customer's normal 30–day requirements and has refused to accept such orders. (J. M. Robinson, 1048) PPG gave a rebate off the increased price to compensate for the

amount of antiknock which PPG was unable to deliver before the effective date of the price increase. (Robinson, 1117–19) [***]

Nalco has accepted orders for up to 60 days' normal supply at the time of a price increase notice. (Altman, 1270, 1497–500) Nalco has allowed customers to order antiknock compounds before the effective date of the price change with shipment after the effective date at the old price. (Altman, 1393–94, 1547–48) Nalco invoiced the customer at the old price and sometimes backdated an invoice. (Altman, 1438, 1533–34; CX 1878) [***]

82. Respondents' antiknock customers have realized savings through respondents' practice of accepting and filling advance orders based on price increases. (Charles, 2591–92; **[39]** McCormick, 2705–07; Solomon, 2832–34; RDX 311) [***]

3. Tolling Arrangements

83. Under a tolling arrangement a respondent purchases the raw material from the refiner, manufactures the completed antiknock product, and sells it back to the refiner according to a formula that specifies the price. (Lockerbie, 877) [***] **[40]** [***]

87. Mobil and Union purchased TML from Nalco and had it shipped to Du Pont for mixing with Du Pont's TEL prior to shipment to the refiners. Neither refiner realized any discount on Du Pont's TEL portion of the multi-leg transaction. Du Pont also realized a reaction fee on the mixture. (Tunis, 503–05)

4. Credit Terms

88. Special credit terms in the form of a delay in the buyer's payment were offered to both small and large refiners. (Altman, 1429; J. M. Robinson, 1210–11; Hay, 4157–69; Koehnle, 4608–11) Special credit terms and deferred billing are equivalent to a discount equal to the value of use of the money for the period payment is deferred beyond normal payment terms. (McCormick, 2642–46; Hay, 4167–69; *see also* Charles, 2530–34; CX 1585B-C) A firm price could be a discount if the price goes up during the time frame of the firm price. (Hay, 4326)

89. In April of 1976, Du Pont, Ethyl, and PPG all extended their credit period for Toscopetro, which was having financial problems, from 30 days to 90 days. (J. M. Robinson, 1096–98; Koehnle, 4609–11, 4630–31; REX 224A-B, 225A-B) In May of 1978, Good Hope Industries, which had been in bankruptcy proceedings since 1975, obtained credit from PPG and Du Pont. Ethyl later matched PPG's and Du Pont's credit terms. (Koehnle, 4609–11; REX 216A, 218A, 219). Subsequently, in late 1978 and early 1979, Du Pont, Ethyl, and PPG again extended Good Hope higher lines of credit. (REX 217, 221, 222)

Ethyl, since August of 1977, has offered Petroleum Industries favor-

able credit terms. (REX 227) Ethyl also has offered special credit terms to Delta Refining and Golden Eagle. (Koehnle, 4608–11) PPG met Ethyl's credit terms at Golden Eagle. (J. M. Robinson, 1098–99)

Since 1978, Nalco has offered certain small refiners—including Plateau, Giant, and Thriftway—extended credit terms of between 60 and 90 days. (Altman, 1429, 1513–14, 1543; CX 1072C, 1904) [***] [41] from Nalco to Du Pont prior to shipment from Du Pont to Union. (Charles, 2529–30, 2593; *see also* Charles, 2560–62; Tunis, 503–05) Nalco's service manager, a sales representative for Nalco since 1963, testified that he had never offered sixty-day credit terms to anyone. (CX 1956Z58)

PPG gained part of Goodhope's lead antiknock requirements by selling to Goodhope Refining Co. on 30–day terms when that refinery was in bankruptcy proceedings and was buying on cash terms from other lead antiknock suppliers. Ethyl lost business due to its initial failure to offer such credit terms. (REX 216A, 219, 324; RPX 36, 37A-C) Coastal States has received price protection from PPG on a fixed number of cars of antiknock compound for a 90–day period. (Fremd, 1705, 1766–67) [***]

E. *Provision of Services*

1. Direct Provision by Respondents

90. Respondents, since the 1950's, have supplied services at no additional charge in conjunction with antiknock compound sales. (Lockerbie, 684; J. M. Robinson, 1076; Park, 1834–35; Shouse, 2874–75; Koehnle, 4591–92) The services fall into three general categories: (1) services related to safe handling of antiknock compounds; (2) product-related services to help refiners make more efficient use of antiknocks; and (3) business services related generally to more economic or safe operation of customers' refineries without any direct relationship to antiknock compounds. (Tunis, 72–74; J. M. Robinson, 1068–72; Altman, 1293–96; Park, 1835–38; Wilson, 3231–32; Koehnle, 4584; CX 960Z1–Z2, 1952Z71–Z72; REX 230A-Z182) All respondents routinely have performed various safety-related services for customers, such as assisting in cleaning customers' weigh tanks, helping customers clean-up when they spill lead antiknock fluid, and instructing customers' employees in the safe handling and use of lead antiknocks. (Lockerbie, 954; Altman, 1293–94; Charles, 2550; Steen, 3395; Fetter, 4468–69; J. A. Robinson, 5353–54; REX 229) An Ethyl official testified that safety services were part of the antiknock product package. (Lockerbie, 774). A PPG Vice President testified that PPG could not duplicate Ethyl's and Du Pont's in-house services; according to this official Ethyl and Du Pont literally buried customers with their ser-

vices. (J. M. Robinson, 999) An Ethyl official testified that six or seven very large [**42**] refiners used relatively small amounts of services in relation to sales dollars; nine or ten large refiners took full use of technical services; and about one hundred small refiners took very broad use of services. (Lockerbie, 723–24; *see also* Tunis, 317)

(a) *Ethyl*

91. Most of Ethyl's services were provided by "in-house" expertise. (Koehnle, 4584–4607) Because of the explosive and toxic nature of lead antiknock compounds (F. 13), Ethyl has taken an active role in designing, building, and monitoring "lead plants"—customers' facilities for the storing and blending of lead antiknocks into gasoline. (Koehnle, 4585–86, 4588) Ethyl employs safety specialists who supervise cleanup and decontamination whenever a customers' refinery has a fire or explosion. (Wilson, 3273, Koehnle, 4589–90; RPX 1501) Ethyl's safety specialists also investigate the causes of customers' refinery accidents and help with prevention programs. (*Id.*)

Ethyl performs an "RT–70" blend study for its customers that determines what lead antiknock compound will be most cost-effective for each customer to use at each of its refineries. (Charles, 2609–11; REX 10B, 230Z9–Z14) Ethyl also conducts surveys measuring the concentration of lead in gasoline and overall gasoline quality which it makes available to customers without charge. (Lockerbie, 844–45; Rowe, 2351–52; Werling, 3610–11; Koehnle, 4593–94; REX 11A-B) Ethyl provides some customers with weigh tanks (in which lead antiknock fluid is stored), knock engines (used for testing gasoline quality), and various valves and fittings used in customers' lead plants. (Koehnle, 4598–99, 4599–600; REX 1D, 186, 262, 274, 276, 277, 278, 281, 283, 288)

(b) *Du Pont*

92. Most of Du Pont's services were provided by "in-house" personnel. (Tunis, 73–75; Park, 1835–38; CX 960Z1–Z2) Services include training customer personnel in safe handling procedures and monitoring such procedures (CX 960Z5); assistance in gasoline blending and the application of computer technology to optimize gasoline production (CX 960Z3; Park, 1837–38); engineering services, such as pump seal maintenance and infrared thermography, as well as service generally involved with the operation of the refinery, such as assistance in meeting federal environmental and noise regulations. (CX 960Z2–Z3) The cost to Du Pont of these services was very slight, and were of significant value to refiners. (Tunis, 244) Some of Du Pont's "in-house" services could have been purchased by its customers from outside consultants, such as computer systems that could be

purchased from Bonner and Moore, or Profimatics. (Park, 1837; Bonner, 5924–25, 5933) A Du Pont executive testified that Du Pont had the most expert technology on safety [**43**] matters in any industry. (Tunis, 474) Du Pont sold some of the technical services that it gave to antiknock customers. (Tunis, 74, 78)

Du Pont also assists its customers in determining the best lead antiknock compound to use in its monitoring of overall gasoline quality. (Tunis, 454–55; Park, 1864) Du Pont has provided free equipment to certain customers (REX 250, 251, 252, 263, 267, 273), and has purchased and installed weigh tanks and knock engines for customers. (RPX 57, 306)

93. Ethyl and Du Pont offer their customers other free services not directly related to customers' use of lead antiknocks, including: (1) various refinery inspections, including inspections for possible heat loss in the refining processing unit and surveys to detect and correct any possible Occupational Safety and Health Act violations at a customer's refinery (Charles, 2548; Dana, 4468; Fetter, 4509–10; Koehnle, 4588); (2) the constant analysis of a customer's refined product in order to correct for color variation (Fetter, 4507–08); (3) the training of customers' employees to repair various pieces of refinery equipment; and (4) computer programming models for use in refinery operations. (Charles, 2250; J. A. Robinson, 5359–61)

94. A Du Pont executive testified that doing away with services and operating a "commodity-type" operation was not in Du Pont's best interests; it would not generate the profits Du Pont desired. It was a more profitable operation to use free services as a competitive weapon than to operate without the services. (Tunis, 65–66, 71, 77, 116)

(c) *PPG*

95. At some refineries, PPG regularly inspected storage tanks and unloading facilities and, from time to time, supervised unloading procedures. Storage tanks are X-rayed to detect weak spots so that they can be replaced before leaks occur. Normal practice in the refinery industry is that refiner personnel will not open a lead line, (*i.e.*, pipes), without a representative of a lead supplier being present to supervise the undertaking. PPG supervises the cleaning of refinery tanks used to store lead antiknocks. PPG supervises handling of any lead-contaminated materials, and where tankcars are destroyed by train wreck or explosions, PPG identifies, collects and transports to its Beaumont plant all remaining parts of equipment contaminated by contact with lead antiknocks. PPG provides all of these services free-of-charge to its refiner customers and believes that its competitors do also. (White, 5947–48, 5958, 5966–72, 5977)

PPG has provided free equipment to its customers (REX 250–263),

including valuable knock engines to some small refiners, in addition to providing training courses to the employees of large refiners. (Mallet, 5852–55; RPX 335, 336) [44] [***] PPG has upgraded and extended computer systems to customers and has purchased for its customers some computer models. (Bonner, 5916, 5918–19; RPX 1513A-D, 1514A-C) PPG will help its customers set-up and operate the laboratories necessary to monitor the use of lead antiknock fluid in gasoline. (Fremd, 1696–97) In addition, PPG has given oil import tickets valued from 10¢ a barrel to $1.50 a barrel free-of-charge to customers such as Crown Oil, Amoco and Gulf. (McCormick, 2791–92, 2811; J. A. Robinson, 5362; RPX 1447, 1502–03, 1504–05, 1506, 1507A-B, 1508A-M, 1509, 1510)

PPG uses selected outside consultants to provide services to its customers (J. M. Robinson, 999–1000), such as Bonner & Moore Associates, Inc. (Bonner, 5875 *et. seq.*); and Management and Training Services (Warren, 5714 *et. seq.*). PPG does not disclose to the customer the cost to PPG of the consultant's services; and neither do the consultants. (J. M. Robinson, 1152; Fremd, 1628; Bonner, 5896–98, 5940–41; RPX 70–74, 91–93, 174–75, 177; CX 1661B) PPG does not provide any services to some of its larger customers. (J. M. Robinson, 1176–78; Fremd, 1633). PPG attempts to limit its payment for consultant services to 3 percent of sales to a customer. (Fremd, 1771)

(d) *Nalco*

96. Nalco's in-house service organization is dedicated only to the safe handling of antiknocks. (Altman, 1405) In 1976, Nalco started a catalyst-oriented packaging arrangement ("COP") which was made available to refiners. (Altman, 1428) The program involves a procedure for a refiner to use in loading a catalyst into a particular vessel. Nalco has a sub-license agreement with Arco which requires Nalco to pay royalties to Arco when Nalco authorizes a refiner to use the program. (Altman, 1294–95, 1303–05, 1428–29, 6623) For the COP program and for services furnished through outside consultants or contractors, Nalco generally would get a commitment for a certain amount of antiknock business. (Altman, 1406; *but see* RNX 1593C) About 1978, Nalco commenced using outside firms to supply services to refiners, primarily small refiners. (Altman, 1406, 1409, 1485) [45]

Nalco attempted to limit payment for the COP program and for outside services to 5% of the customer's purchases—"there was nothing firm about 5 percent. It was a negotiated thing if you will." (Altman, 1508; RNX 1593A-Z18) [***] A Du Pont official testified that he did not view the Nalco COP program as a discount to refiners. (Tunis, 511) During the period 1974 through 1979, Nalco paid almost $300,000 for customer services furnished to Crown Petroleum. (RNX 1593–O)

2. Payment of Refiners' Bills

97. In some instances refiners contract for third-party services for which one of the respondents subsequently agrees to pay. (Tunis, 132–34; McCormick, 2783; Altman, 1484, 1508–09; 6330–31; CX 1829B) In some instances the refiner would have paid for the outside service had one of the respondents not volunteered to do so. (Shouse, 2876; J. A. Robinson, 5361; REX 240) Lead antiknock customers save money by allowing respondents to pay bills for services provided by third parties. (Fremd, 1695–96; Dana, 4468) Refiners sometimes find that third-party services subsidized by the respondents are worth more to the refiners than it costs respondents to provide them. (J. M. Robinson, 1073–74; McCormick, 2721; RDX 310A-H) Payment of customers' bills is equivalent to a cash discount. (Tunis, 133–34; McCormick, 2775–77, 2781, 2788; Wilson, 3280, 3343–44, 3352; Hay, 3827, 4137–38, 4140, 4143–44, 4152, 4155–58, 4167, 4325–27)

(a) *PPG*

98. PPG has paid bills for its antiknock customers equal to 3% of the amount that the individual customers pay to PPG for antiknock compounds. (Fremd, 1770–71; J. A. Robinson, 5355–56) Generally under these arrangements PPG will pay outside consultants directly for work that they do for PPG's antiknock customers. (Fremd, 1628; J. M. Robinson, 1073; CX 1173I, 1279B, 1280B; RPX 337A-J)

For example, PPG for many years has purchased computer time for American Petrofina's use. (J. M. Robinson, 1975; Shouse, 2876) PPG has paid a subsidiary of Sun (Suntech) to perform services for Sun. (McCormick, 2769–70; REX 944) PPG subsidized an energy conservation program for Sohio and Vickers Petroleum, saving those refiners substantial sums of money. (J. M. Robinson, 1073–74) PPG has subsidized various personnel training programs for several of its customers, often after customers have expressed interest in obtaining the program at their own expense. (Warren, 5714–15, 5734) PPG has paid an independent computer consulting firm to supply various linear [46] programming models to lead antiknock customers, sometimes after the customers themselves have agreed to acquire such services. (Bonner, 5887–88, 5905; RPX 1513A-D, 1514A-C)

PPG utilized service programs with more than 50% of its total sales volume. (CX 1280B) PPG attributed a 35% increase in sales to 10 important customers, amounting to almost 8 million pounds of additional sales, to such programs in 1975. (CX 1173I)

(b) *Nalco*

99. Nalco has subsidized some of its customers' consultant and other

bills up to a limit of 5% of the total amount that each such customer pays to Nalco for lead antiknock compounds. (Altman, 1297–98, 1416, 1508–09, 6630–31) Nalco's payment of customers' bills takes a variety of forms, including:

(1) An arrangement with Advance Management Technology, a computer firm, under which Nalco pays the firm to supply technical analyses and equipment to certain lead antiknock customers (Altman, 1295);

(2) An arrangement with Brown & Root, an engineering firm, under which Nalco pays the firm to supply engineering services to certain lead antiknock customers (Altman, Tr. 1295, 1406, 1429, 6626–27); and

(3) An arrangement with certain of its lead antiknock customers under which the customer can contract for any service supplied by any third party and Nalco will pay the bills. (Altman, Tr. 1295–96, 1511, 1406, 1429, 6630–31, 6633–34) Under these arrangements, Nalco has paid for architectural plans for several buildings, including a cafeteria for Crown Central. (Altman, 1510–11, 6636; REX 398)

Typically Nalco's customer deals directly with the third party rendering the services, and Nalco reimburses the customer. (Altman, 6630)

(c) *Du Pont and Ethyl*

100. Du Pont and Ethyl have also offered to pay certain customers' bills, although to a lesser extent than PPG or Nalco. On one occasion, Du Pont agreed to pay a bill that Amoco had already incurred for an outside consultant's work, and Du Pont received a substantial amount of business in return. (Tunis, 132–36; *see also* Tunis, 74–75) Ethyl has retained outside consultants to aid particular customers with respect to [47] OSHA difficulties (Fetter, 4510), has paid customers' bills for various engineering services in connection with building lead plants, and has paid for contractors' inspection of lead-holding plants. (Koehnle, 4603–06, 4662–63; REX 10A-D) For example, both Du Pont and Ethyl recently have undertaken to provide and pay for substantial services for Texaco in exchange for Texaco's commitment to purchase specified amounts of lead antiknock fluid from each respondent. (Wilson, 3352, 3362–64) Ethyl received additional business from CRA after agreeing to pay for outside engineering services needed by CRA. (Koehnle, 4605–06)

3. Value to Refiners

101. Most of the services which respondents provided were of value to the refiners. (Tunis, 244; J. M. Robinson, 1077; Park, 1855; Charles,

2551; McCormick, 2720; Shouse, 2874; Solomon, 2820–21, 2849; Wilson, 3242, 3247; Dana, 4467, 4470, 4491; Fetter, 4511–14; Pittinger, 4551–53; Koehnle, 4589; J. A. Robinson, 5355; REX 238, 241; CX 619) Customers regularly calculate the dollar value to them of respondents' technical services and free equipment and compare these dollar sums to the amounts they pay for lead antiknocks. (McCormick, 2720–23, 2775–76; Wilson, 3244, 3280; Fetter, 4513–14, 4531; Pittinger, 4551–52; J. A. Robinson, 5355–56; REX 231A-C, 232, 233, 235, 236, 237, 932, 933, 934, 935; RDX 280, 310G, 324; CX 319, 1019, 1027, 1901) Sun Oil valued each of the services in terms of a cents-per-pound of antiknock or a dollar value based on the cost of the services. (McCormick, 2721–24, 2775–78, 2781–84, 2788; RDX 310A-H; REX 932B-C)

Texaco has placed a dollar value on Du Pont's and Ethyl's services. (Wilson, 3280, 3342, 3362–64) At least some antiknock customers regard respondents' services as discounts off of the list price for lead antiknock compounds. (McCormick, 2721–22; Dana, 4489; J. A. Robinson, 5356; RDX 310H)

102. Some lead antiknock compound customers prefer respondents' technical services to direct cash discounts, either because similar services are unavailable for purchase on the open market (Pittinger, 4552–53; Dana, 4470), or because they know that they could not obtain a substantial enough discount to make up for such services. (Fetter, 4514, 4531; J. A. Robinson, 5356–58) For example, Crown has rejected a direct cash discount offered by a lead antiknock compound supplier because Crown believed that its services arrangements with other suppliers were more to its advantage than would be a direct cash discount. (J. A. Robinson, 5357–58) Some refiners relied on the value of proposed or ongoing services in deciding on the annual commitment of antiknock business to suppliers. (McCormick, 2699; Wilson, 3234–35; 3279–80; Dana, 4465; Fetter, 4506; CX 1202, 1485A-E; RPX 279–281)

An official of Oklahoma Refining Company, called as a witness by Ethyl, testified that some services offered by [48] respondents are available from commercial laboratories and some are not. The services provided by respondents in testing the blending of a new product is "very important." He could get a test report back from a respondent's laboratory in a very few days, whereas a commercial laboratory might take weeks—"Speed, timing is very important to me." (Pittinger, 4552) He further testified: "They are like their supplying systems, they are reliable, we trust them explicitly. I attach a great value to them. It would take an extremely detailed economic study for me to consider a price cut versus the cost or the value of services." (Pittinger, 4553)

103. Some of the services provided by respondents is the equivalent

of cash, for instance, paying bills for computer services previously rendered. (Shouse, 2876–77; Hay, 4140; Markham, 6794–95), or providing oil import tickets which have a definite cash value. (Hay, 4167, 4169–71; RPX 1502–05, 1510) Testimony by the economic experts acknowledged that the supplying of some of the services is the equivalent of a direct reduction from list price. (Hay, 3827, 4137–38, 4167, 4180–83, 4193–95, 4200–01)

An official of Texas City Refining Company testified that he would not have purchased all of the services he obtained from respondents if he had to purchase them out-of-pocket on the open market. (Fetter, 4543) Both large and small refiners frequently indicated a preference for price competition over competition on the basis of "free" services, or at least requested the option of comparing antiknock compound quotations without services to those including existing service programs. (Lockerbie, 849; Altman, 1300–01; McNally, 2130–32; Park, 1838–50; Miller, 1973, 1981–82; Koehnle, 4651–52; Charles, 2534, 2581–82; McCormick, 2723, 2810; Solomon, 2816–22, 2853; Wilson, 3195–96, 3229–30; Steen, 3405–06; Payne, 3509–10; Fetter, 4538, 4541–43; CX 894, 1201; *see also* F. 152–156)

F. *Import and Export Market*

1. Imports

104. In times of shortages, both Ethyl and Du Pont have imported antiknocks from their respective plants in Canada. Other than such limited instances, there was no importation of lead-based antiknock compounds into the United States. (CX 395, 1793A, 1952Z137–Z40, 1955Z29)

The major foreign antiknock compound marketer is Associated Octel Corporation ("Octel"), which is owned by five oil companies; Mobil, Texaco, British Petroleum, Shell and Standard Oil of California. (Tunis, 218; Fremd, 1790) Octel does not sell in the United States antiknock compound market. Several important barriers have prevented its entry, such as the lack of a distribution system and terminal facilities in this country (Tunis, 107, 210–19; CX 1952Z136–Z137); the [**49**] existence of tariffs which made entry unattractive (Tunis, 219–20; CX 1653G); government regulations limiting the future use of antiknock compounds in the United States (Day, 549–50); and, Octel's lack of any excess capacity that it could use for production for the United States market. (Day, 549–50; McNally, 2217) Associated Octel bought some of its antiknock requirements from Du Pont, and in 1980 PPG made sales to Octel. (CX 922L, 923F; Tunis, 218; Fremd, 1618)

2. Export Market

105. In its internal management reports Du Pont estimated the following shares of the export market (excluding Canada and Mexico):

	1975	1976	1977 (est.)	1981 (est.)
Octel	59%	59%	58%	54%
Ethyl	24	24	21	23
Du Pont	3	3	7	10
Houston (PPG)	1	1	1	1
E. Bloc [Eastern Block]	13	13	13	12

(CX 923H, 923M, 926P)
Nalco has not engaged in export sales of antiknocks. (Altman, 6604) The world export market, except for Europe and Japan, was not affected by U.S. lead regulations. (CX 922L) Exports were predicted to increase between 1975 and 1981 for which Du Pont, Ethyl and PPG would compete. (CX 923L)

3. Export Sales By Respondents

106. Ethyl's prices and margins for domestic sales were higher than for export sales during substantial portions of the 1972–78 period. (Tr. 3768 [Stipulation]; CX 489A, 2084) At least one customer complained to Ethyl about being offered antiknock compounds in the export market at prices substantially less than were quoted for domestic use. (Wilson, 3360–61; CX 569A, 571) Texaco complained to Ethyl about a "11¢ spread in Ethyl's domestic versus Ethyl's F.O.B. AS port prices." (CX 569A)

In several instances, Du Pont customers were offered antiknock compounds in the export market at lower prices (net of transportation) than were available in the domestic market. (Tunis, 211–18; McNally, 2142–44, 2155; CX 1840B) For substantial portions of the period, 1974–1979 Du Pont's average domestic price and gross profit margins, net of transportation [50] costs, were substantially higher than for export product, as shown by Appendix G.

PPG's average domestic price net of transportation charges exceeded export prices net of transportation charges for at least substantial portions of the 1975–1979 period. (J. M. Robinson, 1030) This is shown by Appendix H. On several occasions, PPG's domestic customers complained about being offered antiknock compounds in the export market at prices substantially less than were quoted for domestic use. (CX 1950, 1951)

VI. CHALLENGED PRACTICES

A. *Advance Notice of Price Changes*

1. Use Generally

107. All four respondents follow the practice of giving advance notice of price increases. (Tunis, 155–56; Altman, 1432–33; Fremd, 1706; Gill, 4697) Advance notice of price increases is a practice commonly used by chemical companies. (Day, 630; Gill, 4697–98; Gorman, 5003–05; RPX 1524A-C)

2. Respondents' Advance Price Notification Practices

(a) *Ethyl*

108. Ethyl's standard form sales contracts provide that:

> ETHYL may, at any time or times, change any of the prices stipulated herein upon thirty (30) days' written notice to BUYER to that effect, and thereupon such revised price shall be paid by BUYER for all compounds to which it applies and which is shipped hereunder after the expiration of such thirty (30) days period. . . .

(REX 6C, 6J)

Other contracts which Ethyl had with its customers also provided at least a 30–day advance notice of a price increase. (CX 1952Z29–Z32, 1953Z15–Z16, Z18, Z22, Z53–Z54, 376C; *see* Lockerbie, 952). The same advance notice of a price increase was also given noncontract customers. (Lockerbie, 692–93) At least since 1974, Ethyl has mailed its price increase notices to customers between 33 and 38 days before each price increase effective date. (CX 1970A-C, 1952Z31–33, 1953Z23; F. 53) The specific number of days varies because Ethyl preferred not to have price increases take effect on or immediately before weekends. (CX 1952Z33, 1953Z18–Z20, Z53–Z54) **[51]** Ethyl's sales personnel notified customers directly, either in person or by telephone, of price changes, with formal written notice sent by letter at the same time. (Lockerbie, 690–91; CX 1953Z25) Ethyl makes price decreases effective on the date of announcement. (Gill, 4706–07; CX 1953Z43)

(b) *Du Pont*

109. Du Pont's standard form sales contract provides:

> The price . . . may be increased by SELLER at any time by giving BUYER at least 30 days prior written notice.

(CX 918A; *see* Tunis, 136–37). Du Pont also extended the same advance notice to noncontract purchasers. (Tunis, 358–59; McNally, 2116; CX

907A) Du Pont generally gave between 34 and 39 days notice when initiating a price increase and at least 30 days notice when following the price increase by another producer. (CX 49; F. 53) Du Pont advised customers of price changes by Mailgram, telegram or letter, followed by printed price bulletins sent by mail. (Tunis, 182, 403; Park, 1825; Diggs, 2419–20, 2425; CX 701) Du Pont also encouraged customer notification by telephone. (Diggs, 2420)

(c) *PPG*

110. PPG's standard sales agreement provides in part, that:

> The price . . . may be increased by SELLER at any time by giving BUYER at least 30 days' prior written notice.

(CX 1267B; *see* J. M. Robinson, 1021–22). PPG generally gave 31 to 35 days notice to customers when increasing the price of its antiknock compounds. (F. 53) The same advance notice of an increase in antiknock compound prices was also given by PPG to noncontract buyers. (J. M. Robinson, 1022) PPG utilized Mailgrams to inform its customers of antiknock compound price changes. (Robinson, 1938–39; CX 1122) PPG's Vice President, John Robinson, testified about the 30–day advance notice:

> Q. I am wondering if you can tell the Judge what is the specific benefit to PPG in giving 30 or more days advance notice of a price change.
>
> A. Really none to the supplier. In fact, you know, it is a nuisance. We would like to eliminate it—speaking personally for my company. (J. M. Robinson, 1046) **[52]**

(d) *Nalco*

111. Nalco's typical sales agreement provides in part:

> The price of NALKYL herein stipulated is subject to revision by NALCO on thirty (30) days prior written notice to BUYER. . . .

(CX 1841L; *see* Altman, 1269, 1433). Some contracts between Nalco and its lead antiknock customers contained the 30–day advance notice clause while others did not. Four of Nalco's lead antiknock contracts do not contain any provisions relating to advance notice of price changes (CX 1842A-Q, 1851A-O; RNX 1A-S, 3A-O, 329A-S) However, contract and noncontract purchasers were given the same 30–day advance notice of price increases by Nalco. (Altman, 1269) Nalco informed its customers of an antiknock compound price change and its effective date by telegram or Mailgram. (Altman, 1269)

3. Customer Testimony About Advance Price Notification

112. Refinery witnesses who testified in this proceeding generally favored the antiknock suppliers' practice of giving advance notice of price changes. (McCormick, 2705; Solomon, 2842; Wilson, 3326; Dana, 4487; Fetter, 4525; REX 2A–Z65) Advance notice allowed purchasers to buy ahead at the old price a reasonable supply of antiknocks. (McCormick, 2663–64, 2704–06; RDX 311; *see also* F. 80)

According to Texaco, the practice of advance notice saves money for a refiner. (Wilson, 3324–25, 3367) Exxon concluded that it had achieved "some savings" by advance notice through forward ordering. (Steen, 3455–56) Smaller refiners believe advance notice is beneficial because it permits forward ordering. (Dana, 4471; Fetter, 4516, 4524–25; J. A. Robinson, 5348) The amount of forward ordering is limited, however, by the refiners storage capacity and the cost of money tied-up in building an inventory, in addition to limitations on advance buying which respondents established. (McCormick, 2664–65; *see also* F. 80–81) Advance notice of price increases offers purchasers some assistance in their financial and other planning. (Tunis, 391; McCormick, 2663–64; Solomon, 2842; Pittinger, 4555; J. A. Robinson, 5386–87; CX 1952Z38) It also presents an opportunity for refiners to reconsider their contracts with the antiknock suppliers. (Wilson, 3367; Steen, 3456)

B. *Press Communications*

1. Practices of Individual Respondents

113. At the time advance notice of price increases were given to customers, all respondents also issued press releases to the trade and general press. (CX 1465, 1471, 1952–Z5; Lockerbie, 707; Tunis, 152, 182; J. M. Robinson, 1041, 1043–45; Altman, 1364) **[53]**

Ethyl had a standard, detailed procedure for disseminating price change information in press releases. Press releases were prepared and issued by its Corporate Communications Department in Richmond, Virginia. (CX 1953–Z33; Lockerbie, 706–07; Rowe, 2315–16; Gill, 4702–03) Releases were issued by telephone calls, teletype by leased-based lines, and newswire services and mailings. (Rowe, 2315) Among others, telephone calls were placed to *The Wall Street Journal* (which includes the Dow Jones Ticker), Reuters, *The New York Times, Journal Of Commerce,* and *The Oil Daily,* usually within minutes after the price change was cleared by executive management. (CX 518–23, 523–33; Rowe, 2321–23)

Du Pont's press releases were prepared by its Public Affairs Department at the time of a price increase notice. (Tunis, 156–57; Diggs, 2414–15) The releases were disseminated to a number of publications,

including *The Wall Street Journal, The Oil Daily,* the *Journal Of Commerce, The New York Times* and Reuters. (CX 646, 772, 773)

PPG's Public Relations Department had a list of approximately 30 to 40 publications to whom the press releases could be issued, including *The Wall Street Journal* and *The Oil Daily.* (J. M. Robinson, 1044)

Nalco's press releases were issued through its Public Relations Department to such publications as *The Wall Street Journal,* Reuters, AP, UPI, and *The Oil Daily.* (CX 1465, 1471; Altman, 1364–66) Nalco's Vice President and General Manager of its antiknock division, on one occasion, telephoned a reporter from *The Oil Daily* to inform the trade publication that Nalco was meeting a price increase previously announced by Ethyl and Du Pont. (CX 1487)

114. All four respondents stopped issuing press releases in 1977, on the advice of legal counsel. (Tunis, 180–81; J. M. Robinson, 1041; Altman, 1365; Rowe, 2331–33; Diggs, 2413–14; CX 424D, 1163F, 1527F) However, Ethyl, Du Pont and PPG continued to respond to media inquiries about price increases. (Tunis, 180–81; J. M. Robinson, 1041; Diggs, 2413–14; Rowe, 2331–33; CX 424D, 909A, 1163F) Du Pont adopted the policy of having a standby statement ready for press inquiries with respect to price changes. (Tunis, 181; McNally, 2190–92; Diggs, 2414)

In July 1978, PPG did issue a press release in connection with a decrease in TEL prices that it initiated. (CX 1239) A PPG official testified that PPG felt that there was no other good alternative to get this special information to PPG customers. (J. M. Robinson, 1112) **[54]**

2. Stated Purposes of Press Notices of Price Increases

115. The lead antiknock suppliers testified that they used press announcements to keep their names before former and potential customers. (Altman, 1435; J. M. Robinson, 1040). Publication of pricing and other information amounted to a form of free advertising that enhanced corporate images. (Tunis, 394; Rowe, 2361, 2380; Glassman, 6144–45) Publication of price change information also served to assure actual and potential investors that the suppliers were passing on cost increases. (Rowe, 2361) Lead antiknock suppliers also provided price information to the press in order to provide their customers with information as to what was taking place relative to the pricing of antiknock compounds in the marketplace. (Tunis, 361–62; *see also* 362, 365, 393–94; Diggs, 2414; Steen, 3386–87)

C. *Most Favored Nation Clause*

116. A most favored nation clause in a sales contract is a promise by a seller to charge that customer no higher prices than those charged to any other customer. (Hay, 3811; Markham, 6896)

1. Each Respondent's Clause

(a) *Ethyl*

117. Ethyl's most favored nation clauses provide:

If *Ethyl* sells a compound of equal quantity and quality at price lower than that provided for herein to any oil company in the United States, BUYER shall pay such lower price on all shipments of such compound made hereunder while such lower price is in effect.

(CX 376, 1749B; *see also* Lockerbie, 953)
Ethyl gave the provision several interpretations. The interpretation commonly communicated to customers was that Ethyl was legally required to extend any discount granted to one customer to all others. (Lockerbie, 764–67; CX 1587A, 1713A) A second interpretation was included in a major analysis of market strategies in which the clause was interpreted by Ethyl to require that "legally, a discount offered to one [of Ethyl's four largest customers] would have to be offered to all [four]." (CX 213L) Lastly, an Ethyl executive testified that the provision was construed to require that any discount be extended to all customers purchasing as much or more as the refiner receiving the discount. (Lockerbie, 763–65; CX 73B, 220Q-P; *see* F. 192) In the fall of 1980, Ethyl announced to its customers that it was deleting the most favored nation clause from its sales contracts, effective January 1, 1981. (Dana, 4502; Koehnle, 4615–16, 4679–80) **[55]**

(b) *Du Pont*

118. Du Pont's most favored nation clause provides:

If the SELLER should, during the term of this contract, offer or sell goods of equal quality and quantity to any consumer in the United States for use in motor fuels, other than the United States Government or any department or agency thereof, at a price lower than that provided for herein, the BUYER shall receive the benefit of such lower price on all shipments made hereunder while such lower price is effective.

(CX 195B)
Du Pont's representations to customers and internal interpretation have been that its most favored nation clauses require that a discount to any customer be extended to all others. (McNally, 2117, 2248; Payne, 3522, 3584; CX 1077, 1079A-C, 1081) Approximately 50% of Du Pont's antiknock transactions were made pursuant to contracts containing a most favored nation clause. (Tunis, 357–58)

(c) *PPG*

119. PPG had most favored nation clauses in two of its contracts for

a limited period of time between 1974 and 1979. (Fremd, 1700–01; CX 1267A-F) Its standard contract form does not contain a most favored nation clause. (J. M. Robinson, 1027, 1189) None of its current antiknock contracts contain such a clause. (J. M. Robinson, 1131) PPG is not charged in the complaint herein with using most favored nation clauses. (Complaint ¶ 12(b))

(d) *Nalco*

120. Prior to 1978, Nalco had written contracts with 9 of its approximately 40 customers. Contracts made between 1967 and 1971 with three customers, Mobil, Arco, and Amoco, contained most favored nation clauses providing that the customer would pay as low a price as any other customer to whom Nalco sold or offered "an equal quality and like quantity" of lead antiknocks. (RNX 1F, 3E; CX 1842D-E) Nalco's contracts made between 1967 and 1974 with four other customers, Cities Service, Crown Central, Sun and Exxon, contained most favored nation clauses providing that the customers would pay as low a price as any other customer to whom Nalco sold or offered "an equal quality and like quantity" of lead antiknock compounds on "spot or one year contract sales basis." (RNX 5-O, 331D; CX 1549D, 1841K-L) Nalco's contract with Ashland Oil made in 1977 contained a most favored nation clause providing that the **[56]** customer would pay the lowest price at which Nalco offered or sold TEL alone. (CX 1851E)

Nalco desired to remove the most favored nation clause from its contracts (Altman, 1394; Carlton, 7213–14), and did remove the clause from contracts with Sun, Cities Service and Mobil. (Altman, 1282; McCormick, 2659–61; CX 1547–1548) Other customers objected to eliminating the most favored nation clause in their contracts with Nalco, and three customers still have such contracts. (Altman, 1394–95, 1430) Although Texaco desired such a clause in its lead antiknock contract with Nalco, Nalco refused to include the clause. (Wilson, 3260–62, 3355–56; RPX 1499B)

2. Stated Purposes Of Most Favored Nation Clause

121. The most favored nation clause provides some assurance to refiners that they are not receiving discriminatory prices. (McNally, 2251–52; McCormick, 2732–35; Markham, 6821–22) Small refiners believe that a most favored nation clause puts them on an equal competitive basis with the major oil companies (Tunis, 392; Fetter, 4517–18; Pittinger, 4568–70; Gill, 4713–14; J. A. Robinson, 5349–50, 5370–71; CX 1952Z–85) Refiners were advised by account representatives that the most favored nation clause assured the same price for

antiknock compounds for all customers. (Lockerbie, 767–68; Solomon, 2827; Payne 3522, 3584; Dana, 4497; Fetter, 4518)

122. Ethyl and Du Pont believed their most favored nation clauses, *inter alia,* prevented meeting a competitor's lower price to an individual customer and thus restricted their pricing flexibility. (CX 73I, 220L, 1079A; Day, 603–04; F. 197) Du Pont's Director of Marketing wrote to one of his account representatives: "[I]t is important that our customers not be confused" about the differences between the effects of the most favored nation clauses and the Robinson-Patman Act. (CX 1979A) Respondents frequently cited the clause as the reason for refusals to deviate from a list price quotation. (McNally, 2117; McCormick, 2762; Solomon, 2827; Payne 3522, 3584; CX 1041A, 1587A; F. 194) The record does not reflect that any refiner has asked a lead antiknock supplier to remove a most favored nation clause from its contract. (Tunis, 392; Lockerbie, 837–38; McNally, 2118–22, 2249; Charles, 2575; McCormick, 2719)

D. *Uniform Delivered Pricing*

1. Use by Respondents

123. All four respondents sell antiknock compounds to domestic customers on a uniform delivered price basis, without a separate charge for transportation. (Tunis, 137–38; [57] Lockerbie, 775; J. M. Robinson, 1021; Altman, 1285; McNally, 2123) Respondents' standard antiknock compound contracts provide for delivery at the seller's expense and noncontract customers receive identical delivered price terms. (Tunis, 137, 358; Lockerbie, 775; J. M. Robinson, 1019–21; Altman, 1284–85; CX 376C, 915A, 1267B, 1841; Du Pont Answer ¶ 12) Respondents are generally aware of and believe it is the practice of their rivals to sell antiknock compounds on a uniform delivered price basis. (Tunis, 138, 360; Altman, 1431; Fremd, 1642; Koehnle, 4687; CX 1956Z75)

124. Ethyl initiated the practice of quoting lead antiknock prices on a delivered price basis in 1937 when it was the only seller of antiknocks. (Lockerbie, 761; Koehnle, 4616–17; Glassman, 6016–17). This was done to induce its customers to switch from purchasing antiknock fluid in drums to purchasing fluid by tankcars. (Gill, 4728; Glassman, 6158–59; CX 2002Z60, Z70–Z73, Z98) Ethyl apparently continued the use of uniform delivered pricing because it was an historical practice. (Gill, 4727) Although Ethyl at times referred to its pricing system in the 1930s as "freight allowed" or "freight absorbed," Ethyl officials used these two terms interchangeably, and both referred to a delivered pricing basis. (CX 2002Z60, Z70–Z73, Z98) As each of the other respondents entered the lead antiknock market, each quoted deliv-

ered prices to its customers, so that now all four respondents sell to refiners on a delivered price basis. (F. 123)

125. Lead antiknock compound normally is shipped by rail common carrier in tank cars and is subject to freight tariffs fixed and published by federal and state agencies. (Krippahne, 5053–54; Baker, 5786; Altman, 6697) The transportation equipment necessary to ship antiknocks is owned or leased by respondents, although buyers could lease tankcars from tankcar leasing companies. (Tunis, 389–90; Altman, 1293; Koehnle, 4638; Krippahne, 5148)

126. Uniform delivered pricing increases the price some customers must pay for antiknocks. For instance, by purchasing from the nearest supplier and paying actual rail transportation charges in 1979, Exxon could have saved as much as $630,000 over the industry average freight charge of each refiner purchasing from the nearest supplier. (CX 551B, 555)[16] Consequently, [58] large refiners with locations near respondents' plants requested F.O.B. pricing. (F. 152, 154, 155; RDX 333E, P) An Ethyl salesman wrote his regional manager in late 1976, "F.O.B. pricing . . . continues to be of interest to large refiners." (CX 1622) Uniform delivered pricing benefits refiners located far from respondents' production plants because they would pay more for antiknock compounds under an F.O.B. system than under a uniform delivered pricing system. (Tunis, 297; Charles, 2539–41; Dana, 4471–72; Fetter, 4518–19, 4524, 4532–33; Pittinger, 4554–55) Small refiners receive an advantage from uniform delivered pricing because many of them are located farther from respondents' production points than are their larger competitors. (Glassman, 6165)

Uniform delivered pricing possibly does eliminate some costs customers would incur under an F.O.B. system. Some antiknock customers find uniform delivered pricing economical because it obviates the need for them to pay transportation and inventory taxes and to comply with state freight statutes which require freight bills to be paid within a short time frame. (Tunis, 295–96; Wilson, 3318–21) Uniform delivered pricing also simplifies purchasing decisions, enabling customers to evaluate and compare respondents' prices quickly, and to avoid the hiring of additional employees to check freight rates. (Tunis, 261; J. M. Robinson, 1049; Wilson, 3319–20; Krippahne, 5071) In case of losses in transit, respondents are responsible for dealing with the carriers instead of the refiners. (Wilson, 3318)

127. The average actual delivery cost varied among refiners by at least 5 cents per pound. (RDX 333Q) Individual refiners' minimum average delivery cost ranged from .2 cents per pound to 8.1 cents per

[16] This can be calculated by subtracting Exxon's actual average freight costs of .50 cents per pound when purchasing from the nearest supplier (RDX 333E), from the industry average of 1.53 cents per pound when all refiners purchase from the nearest supplier (RDX 33P), and multiplying the difference by Exxon's total expected purchases for 1979 (RDX 333E).

pound. (RDX 333J, F) Freight charges incurred by respondents in delivering antiknock compounds are small in relation to sales price. (Glassman, 6110–12; Markham, 6813–15; Carlton, 7171, 7188–89, 7193–94) For example, freight charges represent approximately 2.6% of the sales price for Ethyl (REX 8B), and about 2% of Nalco's sales price. (Altman, 1379)

2. Stated Purposes of Uniform Delivered Pricing

128. Since each respondent has a single list price for each antiknock compound regardless of customer location, the delivered price format ensures that list prices are quoted on a uniform delivered basis throughout the United States. (Tunis, [59] 138; Lockerbie, 775; Gill, 4727; Markham, 6811–12; CX 600–17, 1646–47) Customers that purchase antiknock compounds under arrangements other than at list price also receive a delivered price. (J. M. Robinson, Tr. 1020–21; RNX 1C, 3C, 5B, 328B) Because of the toxicity of lead antiknocks, customers have preferred that the terms of their agreements with respondents specify that their purchases be on a delivered price basis in order to assure that respondents bear full responsibility, including any liability, for the product until it has been delivered. (Tunis, 390; Lockerbie, 841–42; J. M. Robinson, 1181; Altman, 1286; Fremd, 1702–03; Solomon, 2838; Wilson, 3318–19, 3367; Payne, 3515; Fetter, 4518–19, 4532–33; Gorman, 5001; J. A. Robinson, 5350–51, 5373, 5386, 5388–89) Of course, primary responsibility for safe delivery of the product rests with the common carrier. (J. M. Robinson, 1054)

VII. INFORMATION FLOW

A. List Price Changes

129. List price information was circulated to several individuals or offices within a number of the refiners. (Charles, 2521, 2537; McCormick, 2717, 2808; Steen, 3387–88) For example, Du Pont sent 300 Mailgrams to individual employees of its approximately 100 customers. (Diggs, 2420–21) Four or five employees of Oklahoma Refining Company received advance notice of price changes for lead antiknock compounds. (Pittinger, 4571)

All respondents made efforts to learn of their competitors' price changes. (J. M. Robinson, 1106–07; Fremd, 1745; CX 1195) Respondents learned of list price changes from a number of sources. One such source was their customers. (Tunis, 131–32, 148–50, 168–73; J. M. Robinson, 1033, 1129–30, 1106–07; Altman, 1359–60, 1451, 1492–94; Fremd, 1738; Diggs, 2427, 2429–30, 2459, 2469, 2741–74; Rowe, 2383–84; Werling, 3641–42; Dana, 4476–80; Fetter, 4521; Koehnle, 4618–22,

4690–91; Gill, 4706, 4788; White, 5982; Carlton, 6969; CX 47, 68A, 176, 329, 340, 466, 911, 923H, 930, 932, 935, 939A, 944A, 945, 948, 951, 952A, 1039, 1040, 1045, 1047, 1048A-B, 1056A, 1058, 1059A, 1060A, 1061, 1062A, 1065, 1066A, 1068A, 1195, 1202, 1289, 1300, 1301, 1303, 1304, 1319, 1375A, 1377A-B, 1381, 1612, 1953Z101–Z102; REX 299, 301, 302, 303, 304B, 305, 321B, 374; RDX 61, 62, 187, 194, 200, 201, 238A, 287A, 288A, 289A, 290, 291A, 294; RNX 9, 798, 892A, 1014A, 1101, 1102, 1118) The exchange of information between respondents and their customers sometimes took place from within minutes to hours after customers first received notice of price changes. (Tunis, 148, 168–73, 405–06; Diggs, 2459–60, 2469–70; Koehnle, 4618–20; Gill, 4702, 4707, 4710–13; Altman, 6604–05; RDX 201; CX 1047) For example, on the morning of January 3, 1979, Crown Central received an Ethyl notice of a price increase and reported the substance of the **[60]** increases to Du Pont by telephone at about 10 a.m. the same morning. (Diggs, 2469–70; CX 1047)

130. Several reasons were advanced as to why lead antiknock customers disclose one supplier's list price change to other suppliers: it assures a constant competitive price to small refiners (Dana, 4479–80); customers wish to preserve good relationships with their suppliers (Gill, 4707–08; Dana, 4480); and customers believe that such disclosure may help to persuade the other suppliers to minimize or postpone a price increase. (Diggs, 2455–57; Wilson 3252–53; RDX 187, 210) The cessation of press announcements by respondents had no apparent effect on the information about competitive price changes which respondents received from customers. (CX 1059A, 1061A, 1300, 1303–04, 1319; Fremd, 1738, 1740–41)

131. Lead antiknock suppliers also learned of or confirmed their competitors' list price actions through news and press accounts. (Tunis, 170, 191; CX 929A, 939A; F. 132–135, 175–182) Information regarding rivals' pricing actions was gathered by telephone conversations, through information retrieval service, such as the Dow Jones ticker, and newspaper and journal articles. (Tunis, 169–73; Rowe, 2323–25; CX 423) Newspaper and journal articles were routinely gathered and filed by at least two of the respondents. (Diggs, 2416; CX 1953 Z8, Z62) At times respondents learned of list price actions from each other. PPG and Nalco routinely sent price change notifications to each other. (Altman, 1356, 1359; Fremd, 1607–08; CX 1456–58, 1461, 1462, 1490A-B, 1508A-C) Ethyl never sent price change notification to other antiknock producers. (CX 1453, 1454, 1455, 1456) On two occasions in 1979, Nalco sent Ethyl such a notice and Ethyl warned Nalco not to do it again. (CX 1453–56)

(a) *Du Pont*

132. It was the general practice of Du Pont's Public Affairs Department to inform Dr. Diggs, Marketing Manager of antiknock compounds, of any information obtained from contacts with the press. (Diggs, 2418) Dr. Diggs acknowledged that Du Pont did, at times, obtain its first indication of a "competitive move" from the press. (Diggs, 2430)

Dr. Diggs was responsible for preparation of Du Pont's "price change schedule"—the documentation for management approval of antiknock compound price changes. (Tunis, 150) The price change schedule indicated whether Du Pont was reacting to a competitor's move and the source of the information regarding the action to which Du Pont was reacting. (Diggs, 2417) Since at least early 1975, Du Pont received information from the press about every price change initiated by a rival prior to the time in 1977 when the practice of issuing press releases stopped. The press was sometimes the initial source of the information, **[61]** sometimes the press confirmed information received from customers and, occasionally, information from the press was received simultaneously with information from customers. The press was the primary or sole source of information in at least seven of Du Pont's price changes. (CX 928A, 936A, 940A, 950A, 953A)

In December 1975, Du Pont learned from the press and a customer about a price increase:

> December 11, 1975 we were informed by [a customer] and by telephone calls from the magazine "American Metal Market" and *The Wall Street Journal* that Ethyl corporation had just announced a price increase of 4.6%.

(CX 935A).

On the next price increase, Du Pont learned from the press about Ethyl's action:

> We learned from *The Oil Daily* on March 12, 1976, and it was confirmed in *The Wall Street Journal* of March 15, 1976 that Ethyl Corp. was increasing prices of antiknock compounds in the domestic market 0.8 cents per pound effective on April 16, 1976.

(CX 936A).

In January 1977, Du Pont learned of a price increase from the press:

> On January 21, 1977 we learned from *The Oil Daily* and it was subsequently confirmed by [a customer] that Ethyl Corp. was increasing prices of domestic antiknock compounds by 0.8 cents per pound effective on February 24, 1977.

(CX 952A).

In March 1977, Du Pont learned of the price increase first from a customer:

[O]n March 1, 1977 we were informed by [a customer] that it had been advised by Ethyl Corporation that Ethyl was increasing the price of domestic antiknock compounds by 0.8 cents per pound effective . . . April 4, 1977. This was confirmed by publication in *The Wall Street Journal, The Oil Daily,* and *The New York Times,* all of March 2, 1977.

(CX 939A). **[62]**

(b) *Ethyl*

133. Ethyl's public relations office obtained information about other antiknock compound producers' actions from trade press contacts as well as from the Dow Jones ticker and other news retrieval services. (Rowe, 2324–25, 2336) Such information was given to the Petroleum Chemicals Division, usually to its head, John Koehnle, who also received similar information from Ethyl's customers. (Rowe, 2325)

Ethyl's employees routinely collected and filed newspaper articles about rivals' pricing actions. (CX 1953Z8) However, those articles may not have been physically clipped and filed until at least one day later. (CX 1953Z61–Z62)

(c) *PPG*

134. PPG did, at times, initially learn of its rivals' price moves from the press. (J. M. Robinson, 1034) In addition, PPG found that the "newspapers were usually a confirmation of what we had heard or what we would gather." (J. M. Robinson, 1034; *see also* F. 179, 182)

(d) *Nalco*

135. Nalco learned at times of its competitors' pricing actions through contacts with the press as well as from newspaper and journal articles. (CX 1389, 1390D, 1487, 1489, Altman, 1359–60; F. 175) For example, W. L. Altman learned on March 7, 1977:

called Jim Brumm [Oil Daily] at 3:35 p.m. [and] told him contents of release—he said Houston moved tu. [sic] also, so that makes all four.

(CX 1487).
On April 17, 1977:

He [Jim Brumm of *The Oil Daily*] said Ethyl announced an increase of 1.8 cents per pound effective 5–26–77.

I called Bud Altman; he had not heard of Ethyl plans, and asked if they cited any reason. He said to tell *Oil Daily* that we are studying the situation. **[63]**

I called Jim Brumm and relayed the message also asked for Ethyl's reasons. He said they cited (1) non-lead material costs, (2) higher transportation, (3) higher labor. I relayed these to Bud Altman via his secretary.

(CX 1390D)

B. *Most Favored Nation Clauses*

136. Ethyl and Du Pont understood that each others' antiknock compound sales contracts contained a most favored nation clause. (Tunis, 360–61; Lockerbie, 755; McNally, 2291; CX 73B, I, 213K-L, 220Q-P, 394Z5, 1952Z90–Z91; F. 197–199) Nalco perceived that the other respondents might utilize most favored nation clauses in conjunction with the sale of antiknock compounds. However, this was not confirmed until 1979 when Nalco was attempting to eliminate its clause from its contracts. (Altman, 1280–81, 1450–51) PPG believed its rivals made use of most favored nation clauses, but this was not confirmed until it read the complaint in this proceeding. (J. M. Robinson, 1025; Fremd, 1643, 1765–66)

Ethyl, Du Pont and PPG had no knowledge of Nalco's use of most favored nation clauses. (Tunis, 146–47; Lockerbie, 754; J. M. Robinson, 1025; McNally, 2287; Koehnle, 4686; CX 731, 213K) Ethyl believed that PPG did not have a most favored nation clause in any of its sales agreements. (Lockerbie, 755; Koehnle, 4687–88; Gill, 4717; CX 73B, I, 1952Z90–Z91)

C. *Uniform Delivered Price*

137. Respondents were generally aware of and believed it the practice of their rivals to sell antiknock compounds on only a delivered price basis. (Tunis, 138, 360; Fremd, 1642; Koehnle, 4687, 4691; CX 1956Z75; F. 184) Ethyl was unsure whether Nalco was using a uniform delivered price with all of its customers and thought that Nalco might be selling to some customers on an F.O.B. basis (Koehnle, 4689–90; Lockerbie, 936, 950)

D. *Competitive Practices*

138. Where respondents had off-list pricing arrangements with customers, strenuous efforts were undertaken to keep the transaction prices confidential. (J. M. Robinson, 1001, 1095, 1144–45; Altman, 1424; Fremd, 1654–56, 1681–82; McCormick, 2672–73) [***] [64] [***]

The type of competitive information which is of concern in the marketplace involves a competitor's actual transaction prices and competitive activities. (Tunis, 483–84; Lockerbie, 950–51; J. M. Robinson, 1146; Carlton, 6984–88, 6994–97; CX 1952–Z159 In an oligopoly the granting of secret price concessions is a way to compete. (Glassman, 6033–39; Markham, 6786, 6790–91; Carlton 6992, 7086–87; *see also* Scherer, *Industrial Market Structure and Economic Performance* 222–24 (2d ed. 1980)) Transaction prices generally are communicated by refiners only to the extent they may be the same as list. (Glassman,

6032–39; Carlton, 7086–89, 7216–19) Customers know a price is "at list" because of its appearance on a price list or other circular. (Carlton, 7093–96; CX 1647) Therefore, if list prices are not published refiners would not readily know whether a quoted price is a list price or a special transaction price. (Carlton, 7095; Koehnle, 4687, 4691; CX 1956Z75; F. 184)

139. Ethyl and Du Pont made certain predictions about their rivals pricing actions. Generally, Ethyl and Du Pont believed they would act similarly and be less likely to discount while Nalco and PPG would be more likely to sell below list price. (Lockerbie, 750; McNally, 2263; CX 922N, 923H-I, 926S, 960W, 969 O; REX 17E) [***] **[65]** [***]

140. Respondents were generally aware of other pricing concessions given by their rivals. PPG knew that all of its competitors allowed advance buying at the time of price increases. (J.M. Robinson, 1098–99) PPG also was aware that Ethyl and Du Pont granted customers extended credit terms and provided paid outside consultants from time to time. (Robinson, 1076, 1090–99)

The lead antiknock suppliers sometimes learned of their rivals' discounts and other pricing concessions because customers disclosed them. [***] **[66]** [***]

141. The lead antiknock compound suppliers also sometimes learned of their rivals' other concessions such as special advance buy offers and credit arrangements, from their customers. (Tunis, 195–96; Lockerbie, 944; Park, 1895–96; Miller, 2010–13; McNally, 2281–82; Koehnle, 4612, 4630–31, 4535–36; RDX 11) In 1977, Ethyl was able to determine that Du Pont picked up invoices for outside consultants, offered new weigh tanks at no cost, and shipped fluid at the old price beyond the effective date of price increases. (CX 43V; *see also* REX 195B) Ethyl was informed of PPG's program of spending up to 5% of sales dollars for a customer on services purchased from outside consultants. (CX 220R)

142. In other instances, some of the respondents, particularly Ethyl and Du Pont, were sometimes able to discern rivals' pricing concessions because their sales representatives could monitor the buying patterns of customers and observe shifts in them. (Lockerbie, 835–36, 878; Gill, 4754) For example, in April 1979, Nalco was able to observe that PPG's TML inventories for its Amoco account were higher than usual. (REX 34A) In some instances, Ethyl and Du Pont account representatives were permitted to enter the area where a refiner blends lead antiknock compounds with gasoline and to look at the refiner's receipt book, which shows what cars were obtained from what lead antiknock supplier. (Tunis, 476–77; Lockerbie, 835–36, 878; Gill, 4754) Ethyl and Du Pont are able to measure their shares of each customer's business by having their account representatives count

the rail tank cars of the different lead antiknock compound suppliers on each customer's premises. (Tunis, 424, 476–77; Lockerbie, 835; McCormick, 2700–01; CX 577A-B; RNX 1424, 1429) Ethyl and Du Pont sometimes found it more difficult to monitor the sales of Nalco and PPG because they made sales to each other through their multileg transactions. (Tunis, 479–80; Gill, 4753; REX 9; RNX 1203, 1217)

VIII. PERFORMANCE OF THE MARKET

A. *Pricing Characteristics*

143. Price competition is the promotion of sales on the basis of product price. It exists whenever a price is offered which is lower than someone else's price in the marketplace. Non-price competition in the lead antiknock market is the promotion of sales by furnishing services (whether or not related to the product) provided without separate charge, credit terms, or other terms or conditions of sale. (Hay, 3773, 3853; Mann, 5625) **[67]**

The main structural characteristics of the lead-based antiknock compound industry which have determined price include the number of firms, the barriers to entry, the homogeneity of the product, and the inelasticity of demand. (Hay, 3779–80, 3784; Mann, 5453; Markham, 6772–75, 6778, 6780–83; Carlton, 6959–60) The lead antiknock industry is highly concentrated, the barriers to entry are high, the product is homogeneous, and the demand is inelastic. (F. 8, 42, 45, 104; Hay, 3779–84; Mann, 5431–32, 5453; Markham, 6776–77, 6779–81, 6783–84, 6790–91; Carlton, 6959–60)

144. Lead antiknocks were sold at less than a monopoly price between 1974 and 1979. (Hay, 3922–23, 3941; Markham, 6805–07; Mann, 5421–22) Antiknock products also had a value-in-use in excess of the selling price of the product. (Tunis, 33–36, 370; Day, 553–54; Cantwell, 5199–204; RDX 332G) Prices also were above marginal cost between 1974 and 1979. (Hay, 3793–96; Markham, 6829; Carlton, 7971) Each additional sale of antiknock compound yielded substantial incremental profits for respondents. (Miller, 1968–70; Hay, 3794; Mann, 5630–31; CX 199G, 492H, 629A-B, 1281B, 1709B) In general, firms in oligopoly markets will charge prices above their marginal costs. (Hay, 3826, 4388; Mann, 5420–21; Markham, 6773–75, 6904–06; Carlton, 7051–53, 7056–57; Scheffman, 7802–03)

145. The lead antiknock compound market had frequent list price changes. There were thirty such changes between 1974 and May 1979. (Hay, 3804; Glassman, 6075–78; Carlton, 7110–12; RPX 1520 A-C; RPX 1523A-C; F. 53) Six of the changes in list price were decreases, three of which occurred in the middle of 1978 when TEL and TML prices were equalized. (F. 52, 54) On two occasions Ethyl undercut Du

Pont's announced price increase. (F. 56) This undercutting had some effect on how refiners awarded their business. For instance, in January, 1978, Du Pont lost one million pounds of business at the Exxon account (eight tank cars) because Ethyl undercut Du Pont's announced price increases in December 1977 even though the prices of all four suppliers ended up at the same level. (Miller, 2014–16; Steen, 3447–49, 3480–81; RDX 278B)

146. In a series of list price reductions in May - July 1978, respondents lowered their list prices for TML from 76.14¢/lb. to 71.10¢/lb., or about 6.6%. (CX 410 O-P, 478, 1066A; RDX 238; *see* F. 52) Respondents at the same time lowered their list price for TEL from 73.62¢/lb to 71.10¢/lb., or about 3.4%. (CX 1261) Ethyl initiated the first list price reduction on May 26, 1978, reducing its list price for TML 2.52¢/lb. (Lockerbie, 808–10; Fremd, 1737–38; McNally, 2232–34; CX 410L, O-P, 478, 1952Z102–04, Z157) [***] Du Pont, PPG, and Nalco [68] matched Ethyl's TML price reduction. (Fremd, 1740; CX 1066A-B, 1247, 1516A; F. 52)

On June 30, 1978, Du Pont initiated a TML list price reduction of 2.52¢/lb. (Lockerbie, 812; Fremd, 1740–41; McNally, 2232–34; RDX 238A-B) [***] Ethyl, PPG, and Nalco matched Du Pont's 2.52¢/lb. price reduction. (Fremd, 1741; CX 393, 1248) For the first time TML was priced below TEL. (F. 52)

PPG initiated yet another list price reduction on July 6, 1978, when it lowered its list price for TEL 2.52¢/lb., thereby equalizing TEL and TML prices. (Lockerbie, 812; J. M. Robinson, 1032–33; Fremd, 1592, 1742; McNally, 2238; CX 1261) PPG's action was its competitive reaction to the earlier list price competition, which had reduced the list price for TML below that for TEL for the first time in history. (CX 410N; *see* F. 52–53)

TML sales constituted about 25% of the total antiknock market. (REX 127P) Nalco's sales were essentially all TML, and constituted about 46% of that market in 1978. (CX 1776A) Thus, the price reductions that occurred, as listed above, would have more of an adverse impact on Nalco's profitability than on any other respondent. (Altman, 1417)

147. Changes in the list price of antiknock compounds most often were correlated with changes in the price of pig lead. (Glassman, 6051; Scheffman, 7795–98; RDX 401; RPX 1519, 1528; F. 57) However, when prices increased more than the cost of lead, large refiners complained about escalating price levels. (CX 566, 568, 577B, 1540, 1542, 1544, 1550, 1552, 1557–60, 1565, 1572–76, 1581–82, 1585B, 1714, 1728, 1731; McCormick, 2674–82) Respondents were constantly pressured by the large refiners to keep prices at reasonable levels. (Tunis, 68–69, 158, 161, 253, 257, 398–99, 435–36, 528; Lockerbie, 724–25, 801–03, 827–28;

see also Glassman, 6100–01; Carlton, 7085–86) Refiners were able to accurately calculate lead antiknock compound manufacturing costs. (CX 394Z5; F. 37)

148. The respondents confronted different market and demand factors. They had different production costs (F. 32–36), and different transportation costs. (F. 127; RDX 333A-Q) Du Pont was the only supplier with a plant on the East Coast (Deepwater, New Jersey) and the West Coast (Antioch, California). (F. 1–4) If consumers and suppliers are located at significantly different distances from each other, transportation costs (and therefore total costs of the delivered product) will vary depending on the identity of either the supplier or customer. (F. 126–127; Hay, 3804, 3892–98; Mann, **[69]** 5462–63) Differences in delivery costs constitute both general cost differences that complicate pricing decisions and, in addition, create a relatively large number of separate delivered costs. Numerous separate delivered costs to different customers make the matching of rivals' price more difficult. (Hay, 3804) Generally, differences between oligopolists in either the absolute level of manufacturing costs or the rate of change in costs make it more difficult for noncompetitive performance to occur. (Hay, 3804–05, 4352–54; Mann, 5457–58; Carlton, 7073, 7068)

149. There was list price uniformity in the lead antiknock industry. Economists testifying in this proceeding recognized that under the prevailing structure of the industry, including a homogeneous product, list prices would tend to be uniform (Carlton, 6992, 7096–98); especially where there was a lot of contact between buyers and sellers. (Hay 3793, 4123, 4323; Markham, 6780–81, 6785; Carlton, 7237–38) As a result of this list price uniformity, the Manager of Chemical Purchases of Sun Oil wrote: "[t]here has never been any price competition in the lead alkyl market." (CX 1585B) He also testified in this proceeding: "we perhaps would have saved more money in the end if there had been price competition of the type that exists in other chemical purchasing areas." (McCormick, 2646–47) A conversation between an Ethyl salesman and a buyer is described in a 1975 internal Ethyl memorandum:

> [The buyer] rejected completely my arguments as regards our demonstrations in the past year of price leadership. He stated on several occasions during the discussion that (I am again quoting) "There is and never has been price competition in antiknocks. This business of either you or du Pont raising the price; the other coming up with a different price which the first company then meets is all a smoke screen. I think it's the biggest wonder in the world that both of you haven't been in trouble with the FTC before now".

(CX 577B)

150. [***] **[70]**

151. The furnishing of services played a significant role in the

competitive rivalry between the antiknock suppliers. Services varied from safety services routinely furnished with the sale of the product, to payment of bills incurred by refiners for consultant services, building a railroad spur, providing oil import credits, and paying architectural fees for a cafeteria. Different values were placed on the services by different refiners, and some refiners sought prices without services. Some major refiners who received discounts did not receive services. It is clear that services were taken into account by refiners when awarding business. (F. 90–103)

B. *Responses to Refiners' Bid Requests*

(1) Exxon

152. Exxon used bid requests on several occasions in an attempt to gain a lower price. Exxon suggested several innovative pricing proposals in the bid requests, such as an F.O.B. manufacturing site pricing option, a volume-related discount option, an option to evaluate services separately, a weight adjustment on tankcar loads, and a long term contract arrangement with or without price escalators. (Robinson, 1059; Steen, 3396–97, 3401–07, 3423–36, 3480; Payne, 3509–18, 3522–28, 3539–40; CX 620, 631, 914, 1222A, 1313, 1323, 1746, 1757, 1914, 1932A, 1949) A significant quantity of business was available to a supplier who responded favorably to any of Exxon's bid requests. (Altman, 1370; Miller, 1592–94, 1967–73, 1975; Steen, 3401; Payne 3525–27; CX 629A, 620A, 1030, 1031A-B, 1051B-C, 1271A, 1322B-C, 1373, 1418A-B, 1956Z89–Z90)

Exxon solicited bids in 1975 for its 1976 antiknock compound business. (Steen, 3379–80, 3401–07) Each respondent was notified of the cancellation of existing contracts and the request for innovative pricing. (Altman, 1369–71; CX 914, 1094A-C, 1102, 1413, 1745, 1949) An Exxon purchasing official testified that "my primary objective [in soliciting bids] was to try to create a competitive atmosphere" similar to that existing in the markets for other chemical products that Exxon purchased. (Steen, 3392, 3403) Follow-up meetings were held with the suppliers to discuss Exxon's 1975 bid request. (Steen, 3404–05) Nalco responded with its list prices. (Altman, 1369–71; Steen, 3418) PPG responded with list prices and did not follow-up with any contact by its sales representatives, as was usual for a bid for such a substantial quantity of business. (Steen, 3419–20) Exxon eliminated PPG as a supplier for its 1976 business (REX 324M), attributable, in part, to PPG's apparent disinterest in gaining Exxon's business. Thereafter, PPG did come forward with "desperate proposal[s]" that Exxon [71] found unsatisfactory. (J. M. Robinson, 1153–55; Steen, 3419–23; CX 1949; REX 785) PPG was advised that if it were interest-

ed in Exxon's business it should respond the following year with an "innovative bid", including the possibility of a better price. (Steen, 3422; CX 1932) Ethyl responded with list prices. [***] Du Pont responded to the bid request for 1976 business with an offer of list prices and standard terms and conditions. (CX 634, 635A-B). [***]

In the spring of 1976, Du Pont sales personnel met with Exxon's Chemical Contract Buyer, W. C. Steen, who reportedly "reiterated" Exxon's belief that "as one of the largest purchasers of [antiknock compounds] and because of [its] refinery locations, [Exxon] should be seriously considered for either volumetric pricing or special consideration for reduced price via reduced freight costs." (CX 914) At the same meeting, Exxon's Manager-Contract Purchasing is reported to have expressed Exxon's concern "about supporting an inordinately expensive price designed to equalize freight, for which they [Exxon] receive little or no benefit." (*Id.*)

In the fall of 1976, Exxon again requested bids for its 1977 antiknock compound business. (Steen, 3423–27; CX 631A-B, 632, 1103, 1222A-B, 1373, 1750, 1751, 1956Z87) In response to this request, Du Pont approached Exxon "to explore . . . how we [Du Pont] might make our proposal attractive in lieu of a price concession" and was immediately informed of "Exxon's interest in obtaining a proposal which would provide for delivery F.O.B. manufacturing plant." (CX 631A-B, 632) Du Pont noted at the time that the "proximity of the Baytown [refinery] to Houston Chemical [PPG] and/or Nalco makes it tempting for either supplier to respond to Exxon's open invitation to supply on an F.O.B. manufacturing site basis." (Miller, 1962–63; CX 631A) Du Pont was apprehensive that 5 to 10 million pounds per year of business might be "endangered" by a PPG or Nalco F.O.B. manufacturing site offer, but anticipated the prospect of an additional 5 million pounds per year of added business for four years if Du Pont quoted prices on other than a delivered basis. (Miller, 1963–64; CX 631A-B) Du Pont elected to bid its list prices and standard terms and conditions. (Miller, 1959–60; **[72]** CX 630) PPG's proposal offered nothing new or innovative and Exxon again rejected the bid and did not offer PPG any business. (Steen, 3424–28; CX 1222; REX 324M; RPX 1517C) Nalco and Ethyl also responded with list prices. (Altman, 1373; Steen, 3396, 3495)

Exxon solicited bids again in late 1977 for 1978 business. (Steen, 3428; CX 628, 1321, 1754, 1956Z95) In considering its response, Du Pont noted that in the case of other additives, Ethyl had obtained 100% of Exxon's business in response to bid requests. Du Pont's sales personnal estimated that 55% to 60% of the Exxon business was potentially available to Du Pont by comparison with the 48% anticipated on the basis of business as usual. (CX 629A; Miller, 1967,

1969) Exxon expressed an interest in and discussed with Du Pont the prospect of 90–day price protection. Du Pont calculated that the increased business resulting from such a contract would provide Du Pont with "an added $2.25 million of sales which on an incremental pound basis could mean $1.12 million of added profit." (CX 629A-B; Miller, 1967–69) Du Pont responded to the 1977 Exxon bid request with a quotation of list prices, as did the other producers. (Altman, 1373; Steen, 3427, 3431; CX 1320A-C, 1755)

In early 1978, following the solicitation for 1978 business, Exxon sent its antiknock compound suppliers a set of guidelines in which Exxon spelled out in detail the innovative types of bids it expected. (Steen, 3429–36; CX 1051A-C, 1322B-C, 1323A-B, 1415, 1416A) The guidelines were to be used in discussions for 1979 business since Exxon found it had not achieved any progress with bid responses in the previous years. (Steen, 3431) The guidelines noted:

Evaluations will emphasize cost saving—price reduction factors including the following which will be included in the bid forms.

- Firm Price Period
- Price Delivered
- Price F.O.B.
- Quantity Discount
- Weight Adjustment Credit
- Preordering Allowance
- Payment Terms
- Consideration for Long Term Agreements

(CX 1051B).

Follow-up meetings were held with the respondents to discuss the guidelines in detail. (Steen, 3434; Payne, 3511–18) Du Pont noted its options included: (a) complying with Exxon's "strongly encouraged" request for an F.O.B. manufacturing site price "could get us over 50% of the business for a period of three to five years. . . .;" (b) a conditional bid at "market price less $0.01/lb. and no comparator service with specified volume," warrants consideration; and (c) Du Pont "could gain 5–[73]10 million pounds of additional business with a 2 cents per lb. volume discount." (Miller, 1982–83; CX 1053Z27–30) PPG's sales representative noted after meeting with Exxon officials that up to 10 million pounds were available in 1979 to PPG for an offer with suitable savings such as an average freight allowance or firm price commitment. (CX 1332B-C) He recommended that consideration be given to offering Exxon a "long term contract," "F.O.B. plant price," and a "firm price guarantee." (CX 1298)

In September 1978, Exxon solicited bids for its 1979 business. (Payne, 3523) The solicitation requested quotations for either Exxon's entire needs or simply its needs at the Baytown refinery, with "no meet competition provision" for a "firm one year price." The Baytown refinery had been singled out by Exxon for individual bids because of

its size (the world's largest) and its proximity to facilities of each of the four respondents. (Payne, 3522–27, 3530; Bonner, 5880) Each respondent uniformly responded by quoting list prices for their antiknock compounds with no separate quotation for Baytown. (Payne, 3528, 3530, 3531, 3538; CX 395A-C, 396A-B, 492H, 1081A-E, 1271A-G, 1418A-B)

(2) Texaco

153. Texaco's Manager of Purchasing, George Wilson, continuously pressed for pricing innovations from the antiknock suppliers. (Wilson, 3204–06; J. M. Robinson, 1059–60; CX 903, 1199, 1312) Mr. Wilson testified that he often met with respondents' sales representatives to discuss their price quotations. He testified that ". . . anytime I saw them I made a request [for a volume-related price]". (Wilson, 3204) Sales representatives would ask for more business and Mr. Wilson's "stock reply" was—"If you'll give us a discount, you can get more business." (Wilson, 3205)

In 1975, Texaco requested bids for its business from each of the respondents. In requesting these quotations, Texaco stated:

> Antiknock compounds have historically been priced identically by all of Texaco's suppliers. We are most concerned that there has been in effect, a fixed price which we assume is paid by all customers, without the normal volume discounts which exist in most markets. With these fixed prices, the only difference we see in our suppliers is the various services rendered by each. We would like to see these purchases handled on a more business-like competitive market basis, and plan, therefore, to place our future antiknock compound business basis [sic] the best volume discount and "service value" offered by suppliers. [74]

(CX 878A-C, 879, 1287A-C; REX 948; *see also* Wilson, 3196–203, 3229–32). The Texaco request asked for the options of a volume discount and a price exclusive of all services or, in the alternative, services unrelated to health and safety (Wilson, 3192–98, 3327–30, 3245; CX 896, 898, 1194, 1713C-D) Texaco was prepared to offer a sizable portion of its purchases to any vendor that offered a price discount. (Wilson, 3200–01) Ethyl estimated that 30 million pounds of potential new business was available and that the "incremental fluid" had "an additional 7–8 cents per pound gross profit over average gross profit figures for our entire volume." (CX 1709B) Ethyl concluded that the situation with the additional sales to Texaco with "all AK's dropped 5 percent in sales price" was a more profitable strategy by approximately $5–1/2 million over a three year period. (*Id.*) In fact, a plan was prepared to implement the volume-related discount which had "been effective with selected oil companies in antioxidant sales over the years and should work with antiknocks." (CX 1710) Nevertheless, Ethyl ulti-

mately responded to Texaco with a list price quotation, as did each of the other antiknock compound suppliers. (Tunis, 426–29; Lockerbie, 765–66, 773–75, 778, 851; CX 903A-B, 1287A-C, 1713A-D)

(3) Shell

154. Shell asked both Ethyl and Du Pont for various forms of pricing and contract term concessions. These included requests for low prices based on long-term contracts, volume discounts, and tolling arrangements. In addition, Shell periodically requested a price F.O.B. manufacturing site and sought pricing without service. (Tunis, 227–39; Park, 1844–47; Koehnle, 4654–62; CX 550A-B, 551A-C, 555; 874A-B, 1036, 1037, 1053Z38–39) Shell was unable to obtain any of these concessions from Ethyl or Du Pont. (Tunis, 229–236; Lockerbie, 786–87, 853; Koehnle, 4662) Ethyl's "unyielding position" with regard to these requests resulted in a significant reduction in its antiknock compound business with Shell. (CX 551A; REX 324Z6) Du Pont's Shell business also suffered dramatically. (REX 324Z6)

(4) Sun

155. Sun devised a three-part strategy to secure pricing concessions: request bids; attempt to negotiate better credit terms in the form of deferred billing; and in the absence of alternatives, maximize receipt of services. (McCormick, 2638, 2640–46; CX 1585A-C, 1586) In 1973 and 1975, Sun requested bids for its antiknock requirements from each of the antiknock suppliers. Sun solicited volume discounts, F.O.B. manufacturing-site pricing, and pricing exclusive of services. (McCormick, 2648–54, 2723, 2810; CX 882A-B, 899, 1227, 1383, 1384, 1584, [75] 1588, 1741, 1742A-B) Each of the respondents responded to the Sun requests by quoting list prices. (Tunis, 256–69; Lockerbie, 781, 851; McCormick, 2651–52, 2653, 2656–58; CX 1228A-B, 1385, 1577, 1578, 1584A-B, 1587A-B, 1588, 1691A-B, 1692, 1733)

(5) Other Refiners

156. Besides Exxon, Texaco, Sun and Shell, other refiners requested the option of comparing antiknock compound quotations without services to those including existing service programs. (Lockerbie, 849; Altman, 1300–01; Park, 1838–50; Miller, 1973, 1981–82; Charles, 2534, 2581–82; Fetter, 4538, 4541–43; Koehnle, 4651–52; CX 894, 1201, 1622) Refiners which sought price quotations exclusive of services, but were unsuccessful, include:

Chevron (Altman, 1300; Park, 1847–48, 1871–73; CX 893, 1372, 1952Z67–Z69);
Kerr-McGee (Altman, 1300–01; CX 1370);

Union (Park, 1873; Charles, 2534; CX 894, 1043A-B);
Arco (Park, 1841–43, 1860–62; CX 890B, 892, 1075C, 1201);
Mobil (Park, 1848–49; CX 1078; RDX 115);
Southwestern Oil and Refining (CX 1936);
National Cooperative Refinery (CX 901);
La Gloria Oil & Gas (CX 891, 1194);
Plateau (Solomon, 2821–22; Koehnle, 4595); and
Good Hope Refining (CX 1902B).

One exception to this pattern was Crown Central. Crown rejected a price discount in lieu of services. (J. A. Robinson, 5357–58, 5365)

Du Pont and Ethyl were reluctant to grant discounts; they concluded that they could not gain any significant amount of business by offering a discount, or lose any significant amount by quoting list prices. (Tunis, 383; Lockerbie, 765–66, 774–75; McNally, 2258–60; CX 213I-L, 396A-B, 1713A-B, 1952Z121–Z123) **[76]**

C. *Other Pricing Proposals By Respondents*

(1) PPG

157. In 1976, PPG offered Exxon a special antiknock mix with only one scavenger. (Fremd, 1692; Miller, 1995–96; Steen, 3473–74, 3421–22, 3487–88; REX 785A; CX 1320A, 1322B; *see also* CX 631A, 906B) PPG made the offer after it learned it would receive no Exxon business for 1976. (CX 631A, 1320A; F. 152) This product would have involved a major specification change for Exxon, and would have required some adjustments by Exxon for the special mix to be a satisfactory substitute. A Du Pont representative testified he was told that Exxon's research did not believe the special mix should be used in Exxon's gasoline from a quality standpoint. (Miller, 1978–79, 1995–97; Steen, 3421–22; CX 906B) PPG's Vice President testified: "This was a kind of desperate proposal." (J. M. Robinson, 1155) In 1976, PPG offered Exxon transportation by barge. The savings to Exxon were never specified in a formal proposal. It would have involved an investment and high inventory costs for Exxon. (J. M. Robinson, 1153–55, 1160; Fremd, 1690–91, 1769, 1801; Steen, 3397–99, 3421, 3473, 3482–83; REX 785A) This delivery arrangement would not have saved Exxon money (Steen, 3397), and Exxon rejected the proposal. (Fremd, 1892) [***]

(2) Du Pont

158. [***]

(3) Nalco

159. [***] [77] [***]

D. *Profits*

(1) Generally

160. Economists believe that profits will be higher in noncompetitive markets than in competitive markets. (Glassman, 6039; Hay, 3796–97; Mann, 5631–32) If, over a period of time and in the face of changes in demand and supply, profits persistently exceed the risk-adjusted opportunity cost of capital, a conclusion may be made that the industry is not competitive. (Glassman, 6039–40)

161. Ethyl characterized its antiknock compound business in early 1975 as a "golden goose". (CX 212Q; Lockerbie, 713–19) In April 1977, the company had substantially improved its profits; it had been able to "recover costs, compensate for inflation, and in addition . . . [gain] approximately 2 cents per pound of fluid gross profit in real 1973 dollars." (CX 73C; *see also* CX 2107A)

Du Pont's antiknock compound business was characterized as "somewhat better than the company average." (Merkle, 5281) In fact, the profitability of the antiknock compound business varied from 70% greater than the Du Pont average in 1979 to 600% greater in 1975, as shown by the following table:

	1974	1975	1976	1977	1978	1979
Du Pont's Antiknock Compound Business (%)	11.4	15.2	16.8	12.5	[***]	[***]
Corporate-wide average (%)	4.2	2.5	3.9	4.3	[***]	[***]

These figures have been taken from RDX 336 and the corporate-wide average from data for the company's return on total assets before deduction of accumulated depreciation in CX 2116C (1974 and 1975), CX 2118B (1976 and 1977), CX 2119C (1978), and CX 2120B (1979). These figures are calculated on comparable [78] bases. (Merkle, 5281–82; Pidano, 7393) A Du Pont intracorporate document shows Du Pont's antiknock pretax return on investment to be 32% in 1976 and 25% in 1977. (CX 926L) Du Pont had a marketing objective of 20% pre-tax return on sales. [***] PPG recognized both in 1978 and 1979 that its antiknock compound business had "historically high returns." (CX 1278B, 1279A; Fremd, 1573–74, 1608–09) PPG stated that "Pricing has been stable." "Competition will have a depressing effect." (CX 1279A)

PPG's intracorporate records show the following pre-tax return on

investment for its antiknock business based on gross assets:

Year	Percent
1974	26.4
1975	48.3
1976	39.5
1977	30.8

(CX 1279D)
[***]

Nalco's net profit before taxes on its antiknock sales for the years 1974-1979 were as follows:

Year	% of Sales
1974	27.96
1975	18.4
1976	20.1
1977	22.3
1978	[***]
1979	[***]

(RNX 333A-Z185, 1582A-P)
[***]

162. Ethyl, Du Pont and Nalco had rising gross domestic profit margins—profit per pound of antiknock compound sold—through 1977, as shown on Appendix I. The record contains no profit margin data exclusive of export sales for PPG. (J. M. Robinson, 1028–29) **[79]**

2. Benchmark Profit Comparisons

163. Industry or company profits expressed in terms of return on investment are supracompetitive if they are substantially greater than an appropriate benchmark. (Mann, 5595–98; Carlton, 7158–59) Appropriate benchmarks consist of returns on investment calculated from major industrial groupings applicable to the market being examined. Major industrial groupings include sectors such as "All Manufacturing", or "Chemicals and Allied Products." The average rate of return of broad industrial groupings may be higher than the theoretically competitive level because some of the firms may possess some monopoly power, and thus these figures constitute a somewhat conservative benchmark. As a result, comparing individual corporate returns on investment with 150% of the average for a broad industrial grouping to determine whether prices and profits are supracompetitive is a conservative standard, and compensates for many factors such as the risk premiums generated by uncertainty and for the imprecision of accounting data. (Mann, 5596–05; Pidano, 7382)

Return on total net assets is a reasonable measure of return on investment for a corporate division. (Mann, 5591–92, 5676; Pidano, 7376–77) Return on total net assets is calculated by dividing net income plus interest expense less taxes (the numerator) by total assets less accumulated depreciation (the denominator). (Pidano, 7604–05) Using an asset base net of accumulated depreciation is generally more appropriate than use of gross or book value of assets without deduction or allowance for depreciation accumulated over the assets' lifetime. (Mann, 5611–12; Pidano, 7394–95)

Returns on investment for major industrial groupings for use as benchmarks can be calculated from data in the Federal Trade Commission's Quarterly Financial Reports ("QFR"). QFR data reflect income and asset values on a historical cost basis. Reasonable major industrial groupings for use as benchmarks in analyzing respondents' profitability include the QFR's data for "All Manufacturing," "Chemical and Allied Products," and "Industrial Chemicals and Synthetics." (Mann, 5597–98, 5609; Pidano, 7382, 7457–58; CX 3002R-T, Z50, Z59–60)

The following average returns on net assets are proper calculations of the respective benchmarks:

	1974	1975	1976	1977	1979	1979
All Manufacturing (%)	10.6	8.6	9.8	9.9	10.5	11.2
Chemicals & Allied Products (%)	13.0	11.2	11.3	10.8	11.3	12.2 [80]
Industrial Chemicals & Synthetics (%)	11.7	9.7	10.1	9.4	10.4	11.1

(CX 2100A-F; Pidano, 7366)

The benchmark used for comparison purposes should be averaged over several years. (Mann, 5616–17) Unweighted averages of the benchmarks for 1974–1979 and 150% of these unweighted averages are:

Category	Average Return on Investment	150% of Average Return on Investment
All Manufacturing (%)	10.1	15.1
Chemicals & Allied Products (%)	11.6	17.4
Industrial Chemicals & Synthetics (%)	10.4	15.6

The respondents' returns on investment from their antiknock compound business between 1974 and 1979 calculated on a basis to yield percentages comparable to the benchmarks referenced above, are shown on Appendix J.

A comparison of each respondent's returns on investment with the averages of the benchmarks shows that:

(i) Ethyl's returns on investment substantially exceeded the 150% benchmarks in every year during the 1974–1979 period. [***]

(ii) Du Pont's returns on investment exceeded the 150% benchmarks in every year during the 1974–1979 period, [***]

(iii) PPG's returns on investment exceeded the 150% benchmark in four of the five years during the period for which data is available, [***] the exception being 1977. [***] **[81]** [***]

(iv) Nalco's returns on investment exceeded the 150% benchmarks in all four years during the period for which data is available, except for the "Chemicals and Allied Products" benchmark in 1975, [***]

PPG's and Nalco's calculations were prepared on a gross asset basis without deduction for accumulated depreciation. If accumulated depreciation had been deducted, as it was in the benchmark calculations, the returns for Nalco and PPG would have been significantly higher. (Pidano, 7404, 7413) In particular, PPG's accumulated depreciation in its antiknock compound business was at least 33% of the gross book value of total investment during the 1974–1979 period and, as a result, deduction for accumulated depreciation would have increased PPG's returns on investment at least 50%. (RPX 1529B; Pidano, 7405) Comparison of individual returns on a net asset basis to a major industrial grouping is proper for determining the profit level (and economic performance) of respondents and of the antiknock compound industry, even though most of the respondents' assets have been heavily depreciated. (Mann, 5995–96; Carlton, 7158, 7162)

164. The data used in computing Du Pont's return on investment information, done on an average cost inventory valuation basis, "are a proper reflection of the earnings attributable to . . . operations." (Merkel, 5250–51) For internal purposes, Du Pont uses only average cost accounting. LIFO is employed by Du Pont for external purposes, principally because of corporate income tax considerations, and generally only on a corporate-wide basis. (Gloyer, 7833–34, 7837, 7844) Conversion of Du Pont's profit data to a LIFO basis could be reasonable only if the benchmark is shown to be calculated on a similar LIFO basis. Companies whose data are included in the QFR data base are taken from Internal Revenue Service reporting categories and they probably report to the QFR on the same basis as for tax purposes. (Gloyer, 7833, 7895, 7898–99; 1978 Federal Trade Commission Quarterly Financial Reports at 7) The 1975 Survey of Corporate Tax Returns assembled and published by the Internal Revenue Service, the last available at the time of Mr. Gloyer's testimony, indicates that 3.5% of all manufacturing companies, reporting 47.7% of all income,

use a LIFO inventory valuation basis for tax purposes. For "Chemicals and Allied Products," the percentages are 6.2% and 59% respectively. The [82] 1974 Survey shows similar percentages. (I.R.S., Publication 16; Statistics of Income, table 9 at 86 and 88; 1974 Statistics of Income, table 8 at 79 and 80)

Du Pont contends that its return on investments should be calculated on a LIFO basis and in this manner compared with an industry benchmark. Du Pont's antiknock return on investment after LIFO adjustment is as follows:

Year	Du Pont Antiknock Return on Investment as Shown on RDX 501 (After LIFO Adjustment)
1974	15.9%
1975	31.5%
1976	35.4%
1977	22.8%
1978	[***]
1979	[***]

A comparison on the above return on investment with the unweighted averages of the QFR benchmarks for 1974–1979 reveals that Du Pont's Return on Investment exceeded the benchmarks in each year. In 1976, Du Pont's Return on Investment exceeded the average return on investment benchmarks by more than 300 percent.

165. The preferred method for looking at profitability is net income after taxes divided by total assets minus accumulated depreciation. (Pidano, 7604–05) Any variations from this methodology in the calculations of respondents' returns and benchmarks have been done in a conservative fashion. Both interest expense rather than only after tax interest expense, and "other non-operating expenses" have been included in the figure for net income. The effect of this is to enlarge the numerator and bias the benchmark return upward. (Pidano, 7378–80)

Ethyl's returns are biased downward relative to the benchmark calculations, since Ethyl's numerator includes only the after tax portion of interest expense, and possibly no interest expense at all. The effect of this is to reduce the numerator and bias Ethyl's return downward. (Pidano, 7416–17)

Du Pont's profits are biased downward by inclusion of export sales which were generally less profitable than domestic sales during this period. (Merkle, 5276–77) These profit figures may also be biased downward by Du Pont's removal of interest income which was not added back into the numerator. If included, this would increase the

numerator and therefore Du Pont's return on investment for the years in question. (Pidano, 7384–85) [83]

PPG's returns are biased downward by inclusion of only the after tax portion of interest expense, thereby reducing the numerator, and, by use of gross assets without deduction for accumulated depreciation, thereby enlarging the denominator. (Pidano, 7409–10, 7412–13; RPX 1529B)

Nalco's returns are also biased downward by including in its income only the after tax portion of interest expense, and possibly no interest expense at all, thereby reducing the numerator. Nalco's profit data also is based upon gross assets without deduction for accumulated depreciation, thereby enlarging the denominator. Correction for each of these factors would have increased Nalco's returns on investment. (Pidano, 7396–7402, 7404)

These benchmark calculations are in accord with internal documents of all respondents which show, at least through 1979, that their antiknock operations were highly profitable. (CX 212Q, 73, 2107A, 1815D, 926L, 1278B, 1279A, D)

(3) Respondents' Profitability Studies

166. Ethyl presented a study prepared for this proceeding which indicated that its return on the cost of replacing its lead antiknock assets with new assets ranged from between 4.29% and 6.45% between 1974 and 1979. (REX 322A-U) Complaint counsel pointed out that several significant factors were not considered in the Ethyl study, and complaint counsel's expert accountant, Mr. Pidano, recalculated Ethyl's replacement cost study, and arrived at a significantly higher rate of return; *i.e.,* 15.5%. (CX 2104A-F) Replacement cost analyses are generally considered by the accounting profession and the Securities and Exchange Commission to be inappropriate for determining an income figure. (Pidano, 7443, 7592–93; CX 2108B)

Du Pont presented a "grass roots" study of the profitability of investment in a new antiknock facility. This study shows a net return on investment of a "grass roots" plant to range from a low of 2.2% in 1974 to a high of 6.0% in 1977. (RDX 335) It is questionable whether such a study is an appropriate benchmark for comparing profitability of an ongoing industry. (Markham, 6804–05) In addition, this study has several questionable assumptions that serve as a basis for the study. First, when Du Pont determines whether to go into a new product line or to expand an existing facility, the corporation compares the project's net returns for first, third and fifth years and cash flow over a ten-year period. (Merkle, 5311–12) RDX 335 shows only the net return for the first year of such a hypothetical plant. (Merkle, 5314–15) Second, the calculations underlying RDX 335 were based on

Du Pont's batch manufacturing technology, rather than the more efficient continuous process technology that Du Pont has had for over 20 years. (Tunis, 85; [84] Merkle, 5285–86, 5293–94; Glassman, 6576; RDX 135H; CX 923I) Thus, the data used in the study probably overstates the costs of construction and operation and, therefore, understates the hypothetical return on investment.

(4) Other Profitability Indicia

167. [***] In addition, Nalco produces only TML, which costs more to manufacture than TEL. (Fremd, 1748–40) Ethyl sells substantially more TEL than TML (based on the fact TML constitutes only 25% of the total antiknock compound market, and Nalco had the largest share of the TML market [about 46%—REX 324Z27; CX 1776A]. (REX 127P; RDX 132 Z10; CX 198A, D, 968B, 1269A, 1305) Some indication of Ethyl's profitability can be gained by comparing Nalco's average gross selling price with that of Ethyl. This is calculated by taking gross lead antiknock revenues for each year, 1974 through 1979, and dividing by the volume of lead antiknocks sold:

AVERAGE GROSS SELLING PRICE (¢/lb.)

YEAR	ETHYL	NALCO
1974	46.476	44.529
1975	57.092	54.883
1976	61.841	59.660
1977	70.072	66.991
1978	[***]	[***]
1979	[***]	[***]

(REX 8A-B; RNX 333A-Z185; RNX 1582A-P)
Nalco was profitable with higher production costs and lower selling prices. It can be inferred that Ethyl, with lower production costs and higher selling prices, was highly profitable.

168. Economists testifying in this proceeding stated that given the structure of the industry, they would expect prices to be above marginal cost. (Hay, 4387–88; Mann, 5420–21; Markham, 6829, 6855–56, 6904; Sheffman, 7802–03) Dr. Dennis Carlton, Nalco's expert economic witness, testified as the final witness in this proceeding, and after all profit data and benchmark exhibits had been received in evidence, he concluded that the antiknock industry was not a competitive industry:

Q. Now, I'd like to direct your attention to paragraph - the last paragraph of interrogatory 15. I'd like to read into the record: "While these profit figures are neither proof of anticompetitive conduct, nor necessary for such a finding, such profit [85] perform-

ance does suggest that the lead-based antiknock compound industry is not a competitive one."

Is this the sum and substance of your testimony thus far?

A. Yes, it is. I mean, I can't vouch for the accuracy of these profit figures, but certainly, this is what I've been testifying to this morning.

Namely, that if you see high profit, at most, it could tell you that price is above marginal cost. That's the same to an economist as saying the industry is not a competitive one. Moreover, once you've seen high profits, you can't, from that alone, determine that it was the practices or some other feature accounting for price being in excess of marginal cost.

You really have to—it is just the first step, once you establish that price is in excess of marginal cost. You have to go on and analyze the features of the industry, structural features, as well as the practices, in detail to see how far that interacts in the industry and how that affects price setting behavior.

(Carlton, Tr. 7976–77)

Dr. Carlton testified that facilitating practices could have effect in some industries (Carlton, 7055–56); however, he was of the opinion that ". . . the structure of the industry explains quite well the subsequent industry behavior." (Carlton, 7043, 7045–46, 7065–66, 7307)

Dr. Hay stated that once you determine price is above marginal cost, and that a pattern of prices reflecting a lack of vigorous price competition and an oligopoly structure conducive to the effectiveness of facilitating practices exists, an inquiry is made to determine how this lack of competition came about. (Hay, 3969–71, 3974, 3990–91) According to Dr. Hay, the facilitating practices interacting with the market structure, reduced the vigor of price competition in the lead-based antiknock compound industry. (Hay, 3785, 3811–14, 3847, 3908, 3929, 3990–93, 4068) [86]

IX. EFFECTS OF THE PRACTICES

1. Advance Notice of List Price Changes

169. The antiknock market in the period 1974–1979 was faced with excess capacity and a declining demand. ". . . [T]he price structure certainly had a potential for declining." (Tunis, 112) An Ethyl official testified:

We want to maintain a stable and profitable market, and my understanding of a stable and profitable market was the opposite of a chaotic market, one where we had a good share of the business, one where we made a good, decent profit on the product, and hopefully we could count on the next year as being roughly the same kind of business. (Lockerbie, 716–717; *see also* CX 270D)

During the hearings, the following testimony was elicited from a PPG official:

Judge Barnes:

. . . But I would like to ask, on this price stability, stability of the market, Mr. Robinson, in your belief did the publishing of identical list prices contribute to market stability?

The Witness:

I believe so, your Honor. (J. M. Robinson, 1002)

Du Pont's Director of Marketing stated that the period after a price increase announcement was "[e]xciting" and "very, very nerve-wracking, tense" (McNally, 2170, 2129), and that "the major tension is being number one [to announce a price increase]." (McNally, 2174) "Everytime you put out a price that is higher than what competition establishes as the second entity in that marketplace, I guarantee you you will take abuse." (Tunis, 415) Learning about price moves was important to respondents because ". . . the second person in the market is the one who really sets the price." (Tunis, 155–56)

170. There was some uncertainty in the lead antiknock market about whether price increases would stick. (Tunis, 112, 396, 398–99, 449–50; McNally, 2129, 2174; Hay, 3816) According to an Ethyl official, if competition followed a price increase "then it should stick." (Day, 556) Refiners were unwilling to purchase from one supplier with list prices higher than those offered by a competitor. (Tunis, 398, 407–10; Park, 1829; Diggs, 2427–29; Wilson, 3291–92, 3295–96; Werling, 3651) The respondents recognized that no producer could survive in the [87] market with a list price higher than its competitors because of the homogeneity of the product. (Tunis 396) The testimony and documentary evidence with respect to pricing of special mixes indicates that refiners were unwilling to purchase from one supplier at a list price even .01¢/lb. higher than that offered by another supplier, and instead notified the high-priced supplier of that fact and amount of the price difference. (Tunis, 407–09; Park, 1829; Diggs, 2428–29; Werling, 3651–53, 3659, 3664; CX 930, 932, 948, 951, 1953Z254, Z257, 1608) Refiners were willing to shift purchases in favor of the lead antiknock producer with a lower price. (Tunis, 155, 240; Solomon, 2832; McNally, 2165–66; Wilson, 3197–3202, 3205; Miller, 1992–94; McCormick, 2648–54; CX 1584B, 1588B)

[P]rice shading of 1–2 cents per pound has been shown to move large volumes of fluid from one supplier to another, and greatly increase profits of the price shader. (CX 204A; *see also* Lockerbie, Tr. 743; CX 629A-B, 1709B)

Ethyl was told by Texaco's General Manager of Purchasing Department that:

Savings of 1¢ per pound could shift a considerable portion of their business since lead AK represents over two times the value of any other chemical used. (CX 569B)

171. Advance notice of list price changes gave competitors time to respond to price changes or to "meet the competition." (McNally, 2129) For instance, Du Pont scheduled announcements of higher prices to provide "an interval which gave our competitors a chance to respond, without having to change the effective date." (McNally, 2129) Ethyl planned price increases by calculating the date by which "competition must reply." (CX 91, 115, 1609, 1953Z86, Z298) As contemporaneously stated in connection with one of its planned increases:

This timing gives 37 days notice and allows one week for competition to respond, including a weekend. (CX 93A)

If "competition" did not "respond," Ethyl would then have to follow contingency plans such as "to roll back our prices." (CX 1953Z298) PPG's management acknowledged that both the timing and amount of its antiknock price changes were determined by the pricing actions of Ethyl and Du Pont, which it endeavored to match. (J. M. Robinson, 1033; Fremd, 1592–93; CX 1285A, 1286)

Advance notice reduced the risk of increasing the list price of lead antiknocks. (McNally, 2165–66; Hay, 3818–19) Advance notice of a price increase assures that the initiator [88] will not be alone in the market with a price higher than its competitors and it prevents a possible shift of short-term business to the lower-priced competitors. (McNally, 2165–66; Solomon, 2831–32; Hay, 3818–19) The advance publishing of list price changes contributed to market stability by transmitting pricing information among rivals regarding the facts and details of a price change and by providing a means of assuring that the list prices of respondents will go into effect at the same time and in the same amount. (F. 53; J. M. Robinson, 1002; Hay, 3811–12, 3878; Glassman, 6560; Carlton, 7237) There were twenty-four (24) price increases in the period 1974 through April, 1979, and in twenty instances respondents had an identical list price that was effective on the same date. In the other four instances, there was an identical list price and an effective date difference of only a day or two. (*See* F. 53)

172. Ethyl, Du Pont and PPG sold special, or non-standard, antiknock compounds. (F. 10) Special mix prices were not included in releases to the trade press (Diggs, 2426; Werling, 3649–51; CX 1660A-H), and were not included in general customer price disseminations, letters and price lists. (Lockerbie, 698–99, 701; Fremd, 1599; McNally, 2186–87, 2192–93) While respondents' published TEL and TML list prices were identical on the various standard mixes at the time price

changes were made, discrepancies in respondents' special mix prices occurred on at least 18 occasions out of 30 price changes between 1974 and 1979 and ranged in amount from .01 cents/lb. to .33 cents/lb., with an average difference of .097 cents/lb. (Fremd, 1592–93; Park, 1824–22; Diggs, 2427–30; CX 1953Z261–Z63) Higher prices were rolled back to match rivals' lower prices when discrepancies were discovered. (Fremd, 1672; Park, 1828–29; Diggs, 2427–29; CX 930, 944, 948, 951, 1061, 1608) These discrepancies are noted on Appendix K.

Ethyl attempted to determine how Du Pont computed its special mix prices because Ethyl "would prefer not to be high on those two mixes again and have to roll back." (CX 337, 1953Z262) Mr. Werling, Ethyl's Manager of Marketing Research and Analysis, testified about this attempt to ascertain Du Pont's pricing formula:

> Apparently I asked the Pricing Coordinator if, based on this difference for this product, he could determine how he thought the competition or how Du Pont was calculating this nonstandard mix.

(CX 1953Z61)

The Pricing Coordinator, Mr. Werling noted, "came back and said that he could not determine or ascertain any pricing formula that Du Pont may be using." (CX 1953Z62)

Similarly, in May 1976, Ethyl discovered that its price for TELMEL –10, then sold to only one customer (CX 2C; Lockerbie, [89] 698–99), was .02 cents per pound higher than Du Pont's price for the third time in successive price moves. (CX 117) Ethyl concluded that "[t]here is not a mistake in calculation on our part. Cannot figure out how competition calculates their price." (CX 117) Other Ethyl management concurred:

> [w]e just don't understand why Du Pont can't get the right price for the mix—it isn't that hard to calculate.

(CX 1617, 1698)

Apparently frustrated by the experience, Ethyl determined to "get them [the refiner] off TELMEL–10," which would have obviated any future price matching problems on its special mix. (CX 1697A-B; Werling, 3696)

2. Press Releases and Standby Press Statements

173. Prior to the cessation of press releases in 1977 articles concerning price changes occurred in the press generally within one to three days of the price change announcement. The following chart shows the first press publication of a price change announcement and the number of days between the price announcement and the first press publication:

Date of Press Release	Company	First Publication of Announcement	Days Difference Btwn. Release and Publication
N/A	E*	2/4/74 Wall Street Journal [WSJ] (CX 354)	N/A
2/5/74 (CX 973)	D*	2/7/74 WSJ (CX 353)	2
3/28/74 (CX 1106)	D	3/29/74 Oil Daily [OD] (CX 1591)	1
6/11/74 (CX 311)	E	6/12/74 WSJ (CX 1595)	1
6/24/74 (CX 975)	D/E	6/25/74 WSJ (316)	1
8/21/74 (CX 976)	D	8/21/74 WSJ (CX 310)	0
3/13/75 (CX 284)	E	3/14/75 WSJ (CX 295)	1 **[90]**
5/14/75 (CX 277; 640C)	D/E	5/15/75	1
6/2/75 (CX 267)	E	6/3/75 New York Times (CX 690)	1
8/14/75 (CX 972)	D	8/15/75 WSJ (CX 264)	1
12/11/75 (CX 702; 228)	D/E	12/12/75 WSJ (CX 711)	1
3/12/76 (CX 188)	E	3/15/76 WSJ (CX 734)	3
N/A[17]	D	4/16/76 OD - (CX 184)	1
7/9/76 (CX 1108)	D	7/12/76 WSJ (CX 170)	3
10/11/76 (CX 153)	E	10/12/76 OD (CS 781)	1
1/21/77 (CX 34)	E	1/24/77 OD (CX 797)	3
2/9/77 (CX 800)	D	2/10/77 WSJ (CX 136)	1
3/1/77 (CX 33; 821)	E/D	3/2/77 WSJ (CX 122)	1
3/4/77 (CX 1113Z 69)	D	3/7/77 WSJ (CX 120)	3
4/19/77 (CX 90)	E	4/20/77 OD (CX 845)	1
8/17/77 (CX 111)	D	8/17/77 OD (CX 66)	0
8/19/77 (CX 101)	E	8/22/77 WSJ (CX 858) **[91]**	3

* "E" stands for Ethyl Corp. and "D" stands for Du Pont.

[17] Price change notification to customers was 4/15/76. (CX 742)

There is substantial evidence in the record that press announcements either provided respondents with the first information of a price increase or confirmed information about a price increase which had been received from customers. (Tunis, 148, 150, 170–71; J. M. Robinson, 1034, 1213; Altman, 1359–60; Hay, 3811–12; Glassman, 6560; CX 821, 831, 894, 938, 935–36, 938, 939, 940, 944, 950, 952, 953, 955, 1389, 1390D, 1487, 1489; F. 131–135)

174. Du Pont stopped issuing press releases announcing price changes in April 1977. (CX 909A-B; Tunis, 180–81, 362–65; Diggs, 2413–14) The other three respondents discontinued the practice in the fall of 1977 with the exception of one PPG announcement to the press of a TEL price decrease in July 1978. (CX 424D, 1239, 1527F, 1953Z5–Z7; Lockerbie, 705–06; Rowe, 2331–32, 2360, 2363–64; Gill, 4703–04; J. M. Robinson, 1041–42; Altman, 1364–65) Relatively few newspaper articles about antiknock compound prices appeared after December 1977. (J. M. Robinson, 1034; Gill, 4704–05; CX 1953Z67) Information on price changes which has appeared in the press since 1977, has sometimes been obtained from "field reports" by customers of the lead antiknock compound producers. (CX 66, 427, 1404, 1602, 1977B) The antiknock compound producers continue to confirm these reports on calls from the press. (CX 420, 1600, 1602, 1977B)

175. The record indicates that press reports were of substantial significance to respondents when price increases were announced, as shown by the following sequences: On March 1, 1977, Ethyl and Du Pont simultaneously announced price increases of differing amounts. The announcements were, at least in part, in response to increases in the list price of lead used to make antiknock compounds. (CX 50, 938) Ethyl's March 1, 1977 announcement was an increase in TEL and TML prices of .8 cents per pound, effective April 4, 1977. (CX 13) Ethyl issued a press release, which was widely disseminated to newspapers and newswires. (CX 33, 518) Ethyl's announcement was timed to permit responses by competitors. According to an internal memorandum dated Monday, February 28, 1977: "4–4–77 [the effective date of the change] is 34 day notification if given today—competition must reply by Friday [March 4, 1977]" in order to match Ethyl's price change. (CX 114) The Du Pont price increase, also announced to customers and to the press on March 1, 1977 (CX 813, 819A-F, 821), was for 2.0 cents per pound, with an effective date of April 7, 1977, thirty-seven days later.

News of the differing Ethyl and Du Pont price actions was carried in the March 2 editions of *The Wall Street Journal* and *The New York Times,* and the March 3 edition of the *Journal of Commerce.* At least

Du Pont (CX 832–34), Ethyl [92] (CX 122) and Nalco (CX 1884) received these reports. A further report was carried in *The Oil Daily* on March 3:

> Both Du Pont Co. and Ethyl Corp. told *The Oil Daily* they are "studying" the situation following announcements of different sized increases on Tuesday, with Ethyl adding that it has 'no immediate plans for further adjustment' of its prices.

(CX 121, 831).

Ethyl's Public Relations department was the source of the statement that Ethyl had no plans for further change of its prices. (Rowe, 2329–30) On March 3, Du Pont's Dr. Diggs noted in an internal memo that "[i]t is not expected that Ethyl will raise their price further, so we will have to lower ours." (CX 955) Dr. Diggs contemporaneously read the March 3 article in *The Oil Daily.* (CX 939A, 955; Diggs, 2431) That article continued:

> The other two domestic producers—PPG Industries' Houston Chemical unit and Nalco Chemical Co.'s Petroleum and Process Chemical division—have not reacted to this latest price increase. But a source close to one noted that they probably wouldn't move until the two major producers had settled on one price.

(CX 121, 831)

The next day, March 4, formal authorization was obtained by Du Pont's marketing personnel to match Ethyl's lower price. (CX 939; Diggs, 2431) The Du Pont price change was announced to customers and to the press on Friday, March 4. (CX 817, 1113Z69) The following Monday, March 7, Du Pont's price announcement appeared in *The Wall Street Journal,* and on March 8 in *The Oil Daily.* (CX 119–20) Each of these articles was found in Ethyl's files. (*Id.*) The Du Pont price announcement also appeared in the *Journal of Commerce* on March 8. (CX 829)

On Monday, March 7, PPG and Nalco followed with announcements and press releases of .8 cents per pound price increases effective April 7, identical in amount to Ethyl's announcement and Du Pont's second announcement and with the same effective date as that initially announced by Du Pont. (CX 1122, 1344, 1484, 1660G) Nalco, for example, received word of at least one of its rivals' actions through the press:

> 3–7–77 - Called Jim Brumm [*Oil Daily*] at 3:35 p.m. and told him contents of release - he said Houston moved tu. [sic] also, so that makes all four.

(CX 1487). [93]

The March 9 editions of *The Wall Street Journal, The Oil Daily,* and *Journal of Commerce* carried news of the PPG and Nalco moves, which were collected by Du Pont (CX 824, 826, 827) and Ethyl (CX 117, 118). Finally, on March 18, 1977, Ethyl rolled back its effective date from April 4 to April 7 at which point each respondent had an identical TEL and TML price increase, effective on the same date. (CX 12)

176. Ethyl could anticipate from Du Pont's initial attempt to raise prices more than .8 cents per pound in the previous price round that Du Pont would probably be amenable to another price increase. Less than one week after the April 7 effective date of the .8 cents per pound increase, Ethyl began planning another price increase. On April 13, 1977, Ethyl's Ralph Werling wrote to his Senior Vice President, J. M. Gill, to propose that the next price increase be announced on Monday, April 18, 1977 to be effective May 25, 1977:

> This timing gives 37 days notice and allows one week for competition to respond, including a weekend.

(CX 93A).

Mr. Gill moved the announcement and effective date by one day, and on April 19, 1977 Ethyl announced an 1.8 cents per pound increase to its customers and to the press. (CX 16, 90) Mr. Werling noted the price change in his records with the following comment:

> PRICE CHANGE EFFECTIVE 5–26–77
>
> * * *
>
> Price Change Announced: 4–19–77
> Day's Notice: 37
>
> Competition must reply by 4–26–77

(CX 91, 1953Z82–83). That same day, April 19, 1977, Du Pont and Nalco learned of the amount and effective date of the Ethyl price move in separate telephone calls from *The Oil Daily.* (CX 940, 1390D-E)

On April 20, 1977 (36 days before the effective date) news of the Ethyl increase appeared (as indicated in Du Pont's files) in *The Oil Daily, The Wall Street Journal,* and *Journal of Commerce.* (CX 845–47) Du Pont and PPG announced on April 20 and April 21, respectively, identical TEL and TML price changes to customers. (CX 836, 1121) PPG also issued a press release. (CX 1660H) Two days later, on April 22, confirmation of the Du Pont price change appeared in *The Wall Street Journal* and *The Oil Daily.* (CX 842, 844) Ethyl [94] collected *The Wall Street Journal* notice. (CX 96) On April 25, notices of the Du

Pont and PPG price changes (each identical to Ethyl's) were printed in *The Oil Daily* and collected by Ethyl, Du Pont, and Nalco. (CX 94, 842, 1351) Nalco also published price changes on April 25 identical to those of the other respondents. (CX 1348, 1390) The Nalco announcement was carried in *The Wall Street Journal* on April 27, which was collected by Ethyl. (CX 96) Thus, by April 26, 1977, the date for which Mr. Werling had noted that "competition must reply," each respondent had announced identical TEL and TML price moves, effective on the same date. In little more than two months each respondents' list price had increased 2.6 cents per pound, or almost four percent in two price increases.

177. The above price increase actions are more fully documented in the record than are other pricing actions. However, this sequence of events does not appear unusual. Ethyl's Ralph Werling, for example, testified that he generally arranged his price change records in the manner described above, to allow time for competition to respond. (Werling, 3627–30) Further, some detail is available with respect to several other price actions. In early October 1976, the major pig lead producers increased lead prices one cent a pound. (CX 162–63) On October 8, 1976, Ethyl's management sought approval from its Executive Committee for a 3.1 cents per pound increase in antiknock compound prices to be announced October 11, effective November 18. (CX 154). J. M. Gill wrote:

> About one cent of this increase will capture increased raw material costs including the latest lead metal increase of one cent per pound. The remainder is to cover costs in other areas including increased distribution costs and the general impact of the current inflation rate.

(*Id.*).

Clearance was given for the increase at 12:25 p.m. on October 11, 1976. (CX 522A) *The Wall Street Journal* was notified at 12:30 p.m. that same day (including the Dow Jones ticker which also moved at 12:30 p.m.), Jim Brumm of *The Oil Daily* at 12:40 p.m., and a variety of other press contacts were made in the next half hour. (*Id.*) All the trade press contacts were completed, and the information carried, at least on the Dow Jones ticker, before notice of the price increase cleared Ethyl's internal teletype circuits. (CX 522A-C) On October 13, 1976, Du Pont's Marketing Manager-Antiknocks wrote to G. C. Tunis, Director of Marketing, seeking authorization to increase antiknock compound prices 3.1 cents per pound effective November 18, 1976:

> We learned on October 11, 1976 from telephone calls to the Public Affairs Department by the *Oil Daily* and *The Wall Street Journal*, and it was **[95]** confirmed in *The Wall*

Street Journal and *Oil Daily* issues of October 12, 1976 that Ethyl is increasing prices . . . 3.1 cents per pound . . . effective . . . November 18, 1976.

(CX 950A).

The October 12 articles in *The Oil Daily* and *The Wall Street Journal* were collected by Du Pont and Nalco. (CX 781, 782, 1354–55). On October 13, Du Pont sent a Mailgram to customers (CX 770) and issued a press release to *The Wall Street Journal, Journal of Commerce, The Oil Daily, Chemical Week, Chemical Marketing Reporter, Oil & Gas Journal, Reuters, The New York Times* and *The News Journal.* (CX 772–73) Reports of the Du Pont action in the October 14 editions of *The Oil Daily* and *The Wall Street Journal* were collected by Ethyl and Nalco. (CX 159–60, 1353) Du Pont and Ethyl, having uniformly increased prices 3.1 cents per pound, were then joined by PPG on October 14 (CX 1129), and by Nalco on October 15. (CX 1492) News articles of October 18 reporting the PPG and Nalco increases were collected by Ethyl and Du Pont. (CX 157–58, 776–77)

178. On May 14, 1975, Ethyl announced a decrease in the price of antiknock compounds. Clearance for the announcement was obtained at 5:30 p.m. and *The Wall Street Journal,* among others, was immediately notified. (CX 277, 529) The next day, May 15, Du Pont sought authorization to match Ethyl's price move citing "[a]n article in the May 15, 1975 edition of *The Wall Street Journal*" as its source of information. (CX 928A)

On March 12, 1976, Ethyl announced an increase in the price of lead-based antiknock compounds. (CX 188, 189) Du Pont initially learned of the increase that same day from *The Oil Daily.* (CX 936A) That information was confirmed three days later in *The Wall Street Journal* of March 15, 1976. (*Id.*) Du Pont then, on March 15, instituted a price change to match the new price level set by Ethyl. (*Id.;* CX 725, 1107)

179. The importance attached to information received through the press is illustrated by the fact that PPG followed inaccurate information in the trade press in preference to what proved to be accurate information available from customers. On January 21, 1977, Ethyl announced to customers and the press an increase of 0.8 cents per pound, effective February 24, 1977. (CX 8, 34) PPG learned of Ethyl's pricing action, and on January 24 announced to customers and the press that it would also be increasing its price by 0.8 cents per pound, effective February 24, 1977. (CX 1128, 1660E) Du Pont, also on January 24, advised its customers and issued a press release that it would increase prices by the same amount and effective the same day as Ethyl. (CX 786, 952A, 1109) Although Du Pont's customers were correctly informed of the February 24 effective [96] date, *The Wall Street*

Journal of January 25 incorrectly reported that Du Pont's effective date would be March 1, rather than February 24. (CX 149) PPG then moved to meet the later date of March 1. (CX 1185) Since inaccurate information was available only from the trade press, and Du Pont's customers had all been informed of the correct date, it can be inferred that PPG either ignored or else did not receive information from customers and relied instead on information received from the media.

180. The importance of giving advance notice of price increases so that "competition" had time "to respond" (McNally, 2129) is illustrated by Du Pont's August, 1977 price move, in which less, but still substantial, advance notice was given. On August 15, 1977, Du Pont initiated a price increase. Du Pont's price increase was effective only 31 days from the date of announcement, on advice of counsel concerned about antitrust liability. (Tunis, 155; Diggs, 2410–11; CX 850, 111) On August 19th, Du Pont was informed by a telephone call from *The Wall Street Journal,* as well as a customer, that Ethyl had instituted an increase of a lesser amount. (CX 944A) Du Pont found that "[b]y the time they [Ethyl] learned of what we were doing they could not match the same effective date and give 30 days' notice." (Diggs, 2413) Ethyl's smaller increase was effective on a later date with 34 days notice. (CX 19, 101) *The Wall Street Journal* of August 22nd confirmed Ethyl's price increase, and Du Pont on that same day asked to roll back its price increase to match the Ethyl price (CX 853, 944), and then matched the timing and amount of Ethyl's increase. (CX 853) This was the first that any list price increase was intentionally undercut (F. 54–55), and Ethyl's inability to match the effective date of Du Pont's price increase may have provided the incentive to undercut Du Pont's price. As a result of this experience Du Pont "lengthened the period somewhat . . . to provide time to test what the competitive reaction would be." (Diggs, 2413)

181. The increased certainty and confidence provided by releases to the trade press is further demonstrated by the events surrounding the short-lived price war in the Spring and Summer of 1978 when TML prices were decreased in two separate pricing actions. (F. 52, 142) Ethyl, for example, found itself "a little gun-shy" in the face of this "real competition" and "scared to death of what was going to happen to us in the marketplace." (Lockerbie, 813) Neither of these first two decreases, led by Ethyl and Du Pont respectively, were accompanied by press releases. (McNally, 2192–94) PPG feared it was the target of the two TML decreases, since it had traditionally produced only TEL, which was now priced higher than TML. (J. M. Robinson, 1109–11) PPG therefore initiated a third industry-wide decrease on July 5, this time involving only TEL, so that the prices of TEL and TML would be equalized. PPG accompanied its price decrease with a press release,

even though the previous Fall it had decided to discontinue issuing releases. (CX 1163F, 1239) [97]

Dr. Dennis Carlton, Nalco's economic expert economist, explained about price decreases in an oligopoly:

> [Y]ou want to make sure . . . that your rival who has very similar interests to you does not misinterpret your price decrease as a secret price cut or as price competition breaking out. It is . . . important that prices be the same and your rival know what you are doing when prices decrease.
>
> . . . [I]t is well recognized that what creates confusion in an oligopoly is any time there is a price change and if a decrease is interpreted as all-out price competition breaking out or discounts breaking out, that could erode the price structure. . . .

(Carlton, 7236–37).

Dr. Hay offered a similar assessment of the publication of price decreases, finding no other "immediately apparent" rationale. (Hay, 3837–40) PPG's rivals could have quickly learned the details of PPG's decrease from the trade press, for at least one wire service carried PPG's story on July 5 (CX 423), the date the decrease was announced, and thereby avoided confusion which could result from scattered reports coming in from customers.[18]

182. After the May-July 1978 price actions ended with list prices for TEL and TML at identical, but lower levels, Ethyl initiated its next price increases in August and September 1978. Ethyl announced on August 7, 1978, a price increase effective on September 9. (CX 464) No press release was issued (CX 424D; Rowe, 2331), and some information PPG obtained regarding the price move was "partially false." (CX 1285A) PPG's Director of Sales, Osborne Fremd, wrote his senior, John Robinson, about the difficulty of getting information: "[W]e [almost] . . . missed our 30 day notification clause. . . ." (CX 1285A). Mr. Fremd continued, "If something as important as a price change can't be picked up immediately, . . . we have some real, real problems." (CX 1285B) These problems continued on the next price increase which Ethyl announced on September 13, [98] 1978, effective October 16. Again no press release was issued. (CX 424D, 458) As before, PPG had difficulty in obtaining information about its rivals' actions, in this case learning "if Du Pont had been competitive [sic]" in following the Ethyl increase. (CX 1299) Because of the lack of accurate information, PPG had to wait until the last day to "send out a reply" to competitors "on our price increase." (CX 1286)

In the August and September price increases, PPG anticipated antiknock compound pricing actions by Ethyl and Du Pont because of

[18] PPG's press release (CX 1239) is undated. However, the July 5 report of PPG's price decrease was carried on the Chemweek Newswire, which Ethyl received (CX 423), although not by teletype but through the mail service which could have been received daily. (Rowe, 2325–26)

the recent pig lead price increases. In both instances, PPG had problems obtaining accurate information about pricing actions. (CX 1286, 1286, 1299) Having learned that Ethyl had passed through only the lead list price increase, PPG did not react until it had determined whether Du Pont had gone along with the "exact" price change. (CX 1285A) PPG was ultimately able to determine both Ethyl's and Du Pont's pricing actions and "send out a reply" (CX 1286); however, PPG was conscious that its increase nearly "missed our 30 day notification clause to contract customers." (CX 1285A)

183. Respondents continued to learn about their rivals' price changes after cessation of press notices, usually within a short period of time. Ethyl after 1977 continued to learn of rivals' price changes from its customers. (CX 47, 68A, 466, 1953, 1612) The same was generally true for Du Pont, PPG, and Nalco. (CX 944A, 945, 1039, 1040, 1045 1047, 1048A, 1056A, 1059, 1058, 1059A, 1060A, 1061, 1062, 1063A, 1065, 1300, 1301, 1303, 1304, 1309; RNX 892A, 1014A, 1101, 1102, 1118; RDX 61, 62, 194, 238A, 287A, 288A, 289A, 290, 291A, 294)

On August 15, 1977, Du Pont notified its customers of a price increase. (CX 850) Ethyl learned of the price change from two customers the same day. (CX 68A) *The Oil Daily* promptly learned of the price increase from "field reports" and on August 17 published an article on the increase. (CX 66) On September 13, 1978, Ethyl notified its customers of a price increase (CX 458); on September 14 Du Pont notified its customers of a matching increase, as did PPG and Nalco on September 15. (CX 417, 1113Z49, 1250, 1513) On October 13, 1978, Ethyl notified its customers of a price increase. (CX 452) Du Pont learned of Ethyl's announcement from one of its customers—Union Oil—the same day. (CX 1059A) On October 16, Du Pont and PPG notified customers of matching increases. (CX 1059A, 1113Z51, 1260) It was not until October 17 that *The Oil Daily* published an article on the price increase. (CX 415) On January 2, 1979, Ethyl notified its customers of a price increase. (CX 441) Du Pont notified its customers of a matching increase on January 4, (CX 1113Z53); on January 5, PPG notified its customers of a matching increase (CX 1252), and Nalco announced a delay in the effective date. (CX 1508) *The Oil Daily* published an article on the price increase on January 5. (CX 447) On February 1, 1979, Du Pont [**99**] notified its customers of a price increase. (CX 1113Z57) PPG notified its customers of a matching increase on February 2. (CX 1242) On March 13, 1979, Du Pont notified its customers of a price increase. (CX 1113Z61) Ethyl notified its customers of a matching increase on March 14. (CX 392) *The Oil Daily* published an article on the price increase on March 15. (CX 1602)

Information received from customers was sometimes inaccurate (CX 1285A) and did not always communicate the effective date of a

price change. (J. M. Robinson, 1033) The record is also clear that customers usually provide price information only if it is a public list price. (J. M. Robinson, 1037; *see* F. 138) Respondents and customers take extreme measures to insure that off-list pricing information is kept strictly confidential. (J. M. Robinson, 1090, 1095; Altman, 1424, 1494, 1529–32; F. 138)

3. Uniform Delivered Pricing

184. Each respondent sells lead-based antiknock compounds only on the basis of a delivered price inclusive of transportation and quotes list prices on a uniform delivered basis. All sales at list price are therefore identical throughout the United States. Respondents generally were aware that each other utilized uniform delivered pricing—"it was the competitive framework which we interfaced with." (Tunis, 138; *see also* Tunis, 265, 338; Lockerbie, 775–76; J. M. Robinson, 1020–21, 1024; Altman, 1285, 1375; Fremd, 1638, 1640–42; McNally, 2123; F. 123) This system of pricing enables respondents to easily determine the list price to any customer in the United States. One economic expert witness testified that "delivered pricing systems of the type we are talking about in this case" are a means by which identical prices can be arrived at by formula. (Glassman, 6521)

185. All lead antiknock fluid is shipped by common carrier and is subject to freight tariffs fixed and published by federal and state agencies. (Krippahne, 5053–54; Baker, 5785; Altman, 6697) Respondents have access to these tariffs. (Gill, 4730–31; Krippahne, 5062–65, 5107–08; Altman, 6697) There are certain variables in determining freight costs; for instance, the shipping point of origin (*i.e.,* respondents' plants), the method of transportation selected, the size of tank car or truck used, and the carrier route chosen. (Krippahne, 5087–88, 5116, 5133, 5154) Whether "trans-loading"—shipping a product for a portion of the journey in jumbo tankcars to a terminal where the product is transferred into smaller rail cars or tank trucks for final destination—is used is another variable. Both Du Pont and Nalco have such facilities. (Tunis, 262; Krippahne, 5084, 5086–87; Altman, 1251, 1293, 6678–81) **[100]**

Shippers may also qualify for reduced rates on the basis of volumes in numerous shipments over a period of time. (Tunis, 387–80) Such savings would not be known until the end of the time/volume period. (Krippahne, 5141–42) If refiners are permitted to take delivery at the respondents' manufacturing sites or transloading terminals, they could qualify for such time/volume discounts. (Krippahne, 5141–43)

Uncertainty in calculating freight variables may increase as the result of the Staggers Rail Act of 1980, Pub. L. No. 96–448, 94 Stat. 1895 (1980) (to be codified at 49 U.S.C. 10101). (Krippahne, 5128–29)

The new statute permits carriers to have more flexibility in adjusting their rates. (Krippahne, 5129)

186. These variables in freight rates and freight costs make ". . . determining individual suppliers' freight costs with any degree of accuracy a difficult, if not impossible, task". (CX 213Z61; *see also* CX 213Z60–Z62; Tunis, 388–90) An official of one respondent described the difficulties inherent in matching prices on an F.O.B. plant basis, plus freight:

> Q. If both PPG and Du Pont were to sell on a manufacturing-point basis plus freight, would you consider it mind-boggling to try to match the price of Du Pont at Getty?
>
> A. Getty and possibly 70 other customers. Yes, it would be a difficult, complex structure to develop to remain competitive under that situation. It would probably take considerable effort to do so—not just for one customer, Getty alone, but as I say, we have 73 customers all at given geographic locations. So the whole problem would be quite complex, in my thinking.

(J. M. Robinson, 1050–51)

187. There is greater uncertainty about delivered cost to refiners when prices are quoted F.O.B. manufacturing plant. (J. M. Robinson, 1050–51; Carlton, 7182–83; CX 213Z61) Delivered pricing does away with these freight rate variables and simplifies price matching by quoting the same price regardless of the distance shipped. (F. 128, 184; Fremd, 1704) In the absence of uniform delivered pricing, respondents could use public tariff information to determine freight rates between certain points. (Tunis, 388–90; Krippahne, 5057, 5072–74; Baker, 5784–85; RDX 333A-Q; 339) However, there would be uncertainty in calculating some of the variables. In one case, Du Pont attempted to determine minimum freight costs to every domestic refinery from the closest antiknock compound plant. That effort produced approximately 30 errors in connection with 102 purchasers, apparently the result of mistakes by Du Pont's marketing department. (Krippahne, 5108–12; RDX 333A-P) **[101]**

188. There have been some few instances of a variation, or offer of a variation, on delivered pricing. Co-producer sales are quoted F.O.B. manufacturing plant. (J. M. Robinson, 1021; Altman, 1285) Since at least the early 1960's, Ethyl has supplied antiknock compounds to Exxon's Baton Rouge refinery by a short pipeline. (CX 1953Z203; Werling, 3724) [***]

189. Some refiners were interested in F.O.B. shipping point prices. (CX 1622; J. M. Robinson, 1051; F. 152–155) Sun requested respondents to quote an F.O.B. price in 1975 to compare it with its delivered prices. (McCormick, 2654; F. 155) On several occasions Exxon requested respondents to quote F.O.B. prices to determine whether such prices would be lower than delivered prices. (Steen, 3455; Payne 3567;

CX 631A-B, 914, 1051B) In fact, PPG offered Exxon an F.O.B. price for lead antiknock fluid in 1976 by way of barge delivery to one Exxon refinery, but Exxon declined the offer. (J. M. Robinson, 1154–55; Fremd, 1699–92, 1769, 1801; Steen, 3398–3400, 3421, 3473–74, 3482–83, 3478–88; CX 1322B; F. 157) Shell periodically requested a price F.O.B. manufacturing site. (CX 550–555, 1036–37, 1622; Koehnle, 4661–62; F. 154).

Du Pont and Ethyl did not wish to quote on an F.O.B. manufacturing-site basis to customers even if it would have led to substantially increased business or the retention of threatened business. (Tunis, 439–40; Koehnle, 4661–62; CX 631) Du Pont's Director of Marketing explained that F.O.B. manufacturing-site pricing to a large customer might cause "all kinds of problems", including ". . . a general deterioration in the overall pricing of antiknock compounds." (Tunis, 441)

190. Average freight costs in the lead antiknock compound industry are small in relation to the total market price. (Glassman, 6110–12; Markham, 6813–15; Carlton, 7171, 7188–89, 7193–94; RDX 333A-Q) Freight costs for the industry are between 1.5% and 2.75%. (Glassman, 6163; F. 127) For all manufacturing the average freight costs as a percentage of total value is 4.5%. (Glassman, 6163; RPX 1525A-F) Freight costs in the lead antiknock market are below that of the average for manufacturing in general. (Glassman, 6164)

191. Between 1974 and 1979, the average actual delivery cost varied among refiners by at least 5 cents per pound. (RDX 333Q) Minimum average delivery costs to individual refiners ranged from .2 cents per pound to 8.1 cents per pound. (RDX 333J, F) **[102]**

4. Most Favored Nation Clauses

192. Ethyl gave its most favored nation clause different interpretations. The most common interpretation communicated to customers was that Ethyl was required to extend any discount granted to one customer to all others, irrespective of the volumes purchased. (CX 1587, 1713; Lockerbie, 764–67) In major company analysis of market strategies the clause was interpreted to require that "legally, a discount offered to one [of Ethyl's four largest customers] would have to be offered to all [four]." (CX 213L) These four customers represented about 25 percent of Ethyl's domestic antiknock compound sales. (*Id.*) Lastly, Ethyl executives testified in this proceeding that the provision required that any discount be extended to all customers purchasing as much or more as the refiner receiving the discount. (Lockerbie, 763–65; Koehnle, 4615–16; Gill, 4713–14, 4716–26; CX 73B, 220P-Q; *see* F. 117) In the Fall of 1980, Ethyl announced to its customers that it was deleting the most favored nation clause from its sales contracts,

effective January 1, 1981. This FTC proceeding was given as the reason for the change. (Dana, 4502; Koehnle, 4615–16, 4679–80)

193. Du Pont's interpretation of its most favored nation clause was that it required a discount to any customer be extended to all others. (McNally, 2117, 2248; Payne, 3522, 3584; CX 1077, 1079A, 1081)

194. Respondents Ethyl, Du Pont and Nalco often cited the most favored nation clause to customers as the reason for refusing to deviate from list price. (McNally, 2117, 2248; McCormick, 2762; Solomon, 2827; Payne, 3522, 3584; CX 1041A, 1587A) Refiners were advised by account representatives that the most favored nation clause assured the same price for antiknock compounds for all customers. (Lockerbie, 767–68; Solomon, 2827; Payne, 3522, 3584; Dana, 4497; Fetter, 4518)

In 1975, Ethyl received bid requests from both Texaco and Sun. Ethyl responded to each with a virtually identical letter indicating that the most favored nation clause guaranteed identical prices to all refiners:

> As you may know, 'Ethyl' antiknock compounds are priced identically to all U.S. refineries for comparable methods of shipment regardless of volume. Our contract . . . provides this guarantee. Legally we cannot give you a special discount on 'Ethyl' antiknocks without breaching all sales agreements now in force.

(CX 1587A, 1713A; *see also* Lockerbie, 765–67)

Texaco's Manager of Purchasing testified that an Ethyl official reiterated this legal reason in a conversation. (Wilson, 3205, 3215–17; *see also* Koehnle, 4666–67) **[103]**

Du Pont responded in similar fashion to an Exxon bid request in 1978, with citation to its most favored nation clauses:

> Presumably, you know that if we offer Exxon a lower price on antiknock compounds we are required to do the same to other customers. From our point of view, any such offer to Exxon will only result in a general decline in prices and an overall loss to Du Pont.

(CX 1081A)

The following year, 1979, Du Pont again emphasized to Exxon the pricing problem created by the most favored nation clause, in refusing to grant Exxon a fixed price for a four-month period:

> [w]e cannot prudently guarantee a fixed price. Our contractual arrangements are such that we would be required to do this on an industry-wide basis, and this would force a business whose profit margins are already shrinking to an untenable position.

(CX 1077)

195. In August 1978, Du Pont's Director of Marketing wrote to a Du

Pont sales representative about a proposal to offer a special price to Mobil:

> Your trade report indicates that Mobil might have the opinion that we could legally meet a competitive price if we had confirmation of the price offered. Our "favored nation" clause (Article 7 "Price Protection") in our contract prevents us from doing that unless we make the same price available to the industry as a whole. It is important that our customers not be confused on this point.

(CX 1079A)

Between 1975 and 1980, Ethyl failed to quote Exxon any price lower than list for lead-based antiknock compounds in response to numerous bid requests. (CX 395–96, 1747, 1749, 1755; Steen, 3412, 3495; Payne, 3530, 3554–55; F. 152) In 1980, with total market demand declining (Koehnle, 4627–29), Ethyl and Exxon discussed a possible discount, but Ethyl's ultimate offer involved only a special "premix" of lead-based antiknock compounds and MMT, which would not be governed by most favored nation clauses. (Payne, 3557; Koehnle, 4682–83; CX 73B, I, 220S) Exxon rejected Ethyl's "premix" proposal and unsuccessfully sought further negotiations. (Koehnle, 4682–83) Ethyl decided to wait until the beginning of 1981 to negotiate further with Exxon (Koehnle, 4683), when Ethyl's new contracts **[104]** would not contain a most favored nation provision. (Koehnle, 4679–80)

196. Prior to 1978, all Nalco antiknock contracts had most favored nation clauses. (Altman, 1276–77) In 1978, Nalco refused to include a most favored nation clause in a contract with Texaco. (F. 120) [***]

197. Both Ethyl and Du Pont recognized that the most favored nation clause restricted their own and each other's pricing flexibility and ability to grant discounts. (Day, 599–600, 604, 614–15, 619; CX 73B, I; 220P-Q; 222B, 394Z5) Ethyl's Petroleum Chemicals Division "made a point . . . that the [most] favored nations [clause] restricted their ability to take actions." (Day, 615) J. F. Koehnle, who was in charge of the Petroleum Chemicals Division (Koehnle, 4581), and J. M. Gill, the company's Senior Vice President (Gill, 4694–95), told Ethyl's Executive Committee that use of the most favored nation clauses placed restrictions on the division's pricing flexibility. (Day, 603–04) An Ethyl management review document, written in November 1975, stated:

> Du Pont like PCD [Ethyl] has evergreen contracts with many refiners. These contracts guarantee favored-nations treatment on pricing for "equal quantity - equal quality." Houston Chemical and Nalco are less encumbered by contracts. (CX 394Z5)

In 1975, B. C. Gottwald, Ethyl's President, asked Mr. Gill in a memorandum what Ethyl should do with respect to most favored nation

clauses "if the price collapses." (CX 505D) Two years later, in 1977, the Chairman of Ethyl's Board of Directors, F. D. Gottwald, Jr., raised the most favored nation clause issue again, asking about Ethyl's marketing strategy in a possible "free-for-all" if "Du Pont abandoned their most favored nations provision with the next set of contracts." (CX 222B) Brian Day, Ethyl's Director of Corporate Planning and one of the draftsmen of F. D. Gottwald's 1977 memorandum, testified about this question posed in the 1975 memorandum:

> Petroleum Chemicals made a point . . . that the favored nations restricted their ability to [105] take actions. So he [B. C. Gottwald, President of Ethyl] said, Okay, suppose Du Pont did it [removed the most favored nation clause] and you didn't do it? Now what would you do? Here you may have to take an action.

(Day, 614–15)
Mr. Gill responded by indicating that to "meet competition" we have to give the same lower price to any customers who buy as much or more fluid from us as the account in question." (CX 73B, I)

198. Ethyl expressly recognized that abandoning most favored nation clauses could precipitate the feared "chaotic" market. Ethyl observed in a March 1977 management planning document that under its contracts:

> . . . we would have to extend the same reduced price to any . . . customer who buys more from us . . . With a new contract that eliminated the favored-nations clause, we could meet competition at a selection account without having to extend the discount. . . . The only advantage of a new contract is that it allows us to meet competition selectively. However, the fact that [Ethyl] was cancelling old contracts and eliminating the favored-nations clause would be known to competition almost immediately. *It would signal to them a basic change in our sales strategy. . . .*

(CX 220P-Q; *emphasis supplied*)

Du Pont similarly believed that it could not eliminate most favored nation clauses without creating "wild speculation as to why." (Tunis, 393) Du Pont's Director of Marketing testified that he (and others) would have reacted to the change in marketing policy:

> I would have said 'What are you doing? Who's got the deal? How much of the deal can I get? What's going on?'
>
> And even if there was no deal, it was just one of those things that by default would have been impossible. (Tunis,. 393)

199. In responding to an Exxon request for a quotation F.O.B. manufacturing site, Mr. Miller, Du Pont's representative for the Exxon account, reported to Du Pont that failure to respond favorably to the request could possibly result in the loss of five to ten million

pounds of business annually, while a positive response offered the prospect of a gain of 20 million **[106]** pounds of additional business over four years with added profits. (CX 629A-B; 631A-B) In trying to determine how Du Pont's competitors would respond to the bid, the representative was concerned that either PPG or Nalco could respond on an F.O.B. manufacturing-site basis, but "excluded Ethyl from the temptation to respond to an F.O.B. invitation, for much the same reason that I believe Du Pont would not respond to this invitation." (CX 631A) Mr. Miller testified that Ethyl's use of most favored nation clauses reduced his uncertainty about Ethyl's expected action:

> Q. Was that [Ethyl's most favored nation clause] a factor in your belief that Ethyl would resist this temptation to give a special consideration to Exxon?
> A. It probably was, yes.

(Miller, 2000).

200. Economic experts who testified in this proceeding were of the opinion that most favored nation clauses reduce the incentive of any one firm to discount to one customer to the extent that it must be extended to other customers. Widening the discount diminishes profitability and increases the likelihood that competitors will discern and match it, thereby limiting the amount of additional business it can generate. (Hay, 3811–13; Glassman, 6512–13; Markham, 6897; Carlton, 7207–09) Mr. Michael Glassman, an economist called by PPG, observed that "[T]he absence of a most favored nation clause in PPG's business helps them compete because they don't feel at all constrained in terms of giving special deals and discounts." (Glassman, 6514–15)

201. The record does not reflect that any refiner has asked a lead antiknock supplier to remove a most favored nation clause from its contract. (Tunis, 392; Lockerbie, 837–38; McNally, 2118–22, 2249; Charles, 2575; McCormick, 2719) Numerous refiners include a clause in their purchase orders which specify that they be accorded most favored nation treatment in their purchases of antiknock compounds. (REX 3A-Z24; *see also* REX 464, 657B, 661, 921, 923, 926) Sun routinely inserts such clauses in its purchase orders. (McCormick, 2763–65; REX 657B, 936B) Smaller refiners value the clause because they believe it puts them on an equal competitive basis with the major oil companies. (Tunis, 392; Dana, 4497; Fetter, 4517–18; Pittinger, 4568–70; Gill, 4713–14; J. A. Robinson, 5349–50, 5370–71; CX 220P-Q) Texaco desired a most favored nation clause in its lead antiknock contract with Nalco, but Nalco declined to include the clause. (Wilson, 3260–61, 3355–56; RNX 648C, 649D, 651A-B; RPX 1499B; F. 120, 196) Two

other customers objected to removing the most favored nation clauses in their contracts with Nalco. (Altman, 1394–95, 1455) **[107]**

202. Ethyl's officials testified that at least since the 1930's Ethyl has followed a policy of treating all customers equally on price, and that Ethyl's own self-interest would be best served by this long-standing policy and its "ethical spirit of doing business." (Lockerbie, 692–93, 714, 756, 761, 764–65, 767, 798, 811, 833–34; Koehnle, 4614, 18, 4679–80; Gill, 4713–14, 4716, 4721–22, 4726) Ethyl's officials testified that Ethyl did not believe that its clause was "an impediment to effective action on [its] part when it was necessary . . ." to discount. (Lockerbie, 762; *see also* Gill, 4716, 4721–22, 4726–27; CX 1952Z84) Ethyl officials also testified that the Robinson-Patman Act "doesn't play an active role" in Ethyl's arrangements with its customers; it "restates our policy" of charging an equal price, "fair treatment." (Koehnle, 4670–71) Ethyl officials also expressed doubt that it could gain business by discounting because it believed its rivals probably would discover any discount and match it or offer discounts to other customers to recoup lost business elsewhere, so that Ethyl ultimately would be selling the same quantity of product at an overall lower price. (Lockerbie, 809–11; Gill, 4715; CX 73B, 213L, 1952Z69)

203. Du Pont officials testified that Du Pont decided from a business viewpoint to treat all of its customers alike, regardless of their size and whether or not they had a contract with Du Pont. (Tunis, 358; McNally 2229–30) According to Du Pont officials, Du Pont believed that if it gave a selective discount to one or more customers, this fact would become known and it would become necessary to discount "the entire market by that amount," which was inconsistent with Du Pont's profit objective. (Tunis, 129) The most favored nation clause was "never a consideration" with respect to meeting a competitor's low price and did not constrain Du Pont from "meeting a competitive situation." (Tunis, 128–29) Du Pont's Director of Marketing testified:

> It [the most favored nation clause] didn't play a very significant role at all. We knew how to discount with a 'favored nations' clause. All we had to do was get somebody who'd take a barge or somebody who would give us a five-year contract or something that changed the terms of that basic clause which talks about equal quality and equal amounts. So we could have come up with schemes that we could have presented to Customer A and then went around and presented to other customers who could meet those strictures, but we never felt that we would help ourselves. We felt that we would lose in the negotiation and that we would lose more in return on sales than we would get on volume. And that was the big parameter.

(McNally, 2247). **[108]**

Du Pont officials also testified that Du Pont believed that selective discounts might cause problems under the Robinson-Patman Act and

that the most favored nation clause was merely a restatement of what the law required. (Tunis, 128; McNally, 2246–47)

X. EXPERT OPINION TESTIMONY

A. *Dr. George A. Hay*

204. Dr. George A. Hay was called as an economic expert by complaint counsel. Since September 1979, Dr. Hay has been a professor of law and economics at Cornell Law School. (Hay, 3770) From 1972 until 1979, Dr. Hay was an employee of the Department of Justice and from July 1973 to June 1979 he served as the Director of the Economic Policy Office of the Antitrust Division. (Hay, 3771) His primary areas of interest are industrial organization, law and economics, and the economics of antitrust. (Hay, 3771)

205. Dr. Hay stated that the lead-based antiknock compound market is highly concentrated (Hay, 3783); the threat of new entry is low (Hay, 3784); that antiknock compounds are homogeneous; and that demand is inelastic. (Hay, 3779–80) Dr. Hay testified that prices in the antiknock compound industry were above marginal cost (Hay, 3793–97), but that he knew of no tight oligopolies in which price was routinely at the level of long-run marginal cost. (Hay, 4388) The fact that prices were above marginal costs is the key to Dr. Hay's opinion as to the effect of the challenged practices. (Hay, 3958–59, 3969) According to Dr. Hay, where price is above marginal cost and there are few deviations from list price, one must look at reasons for this conduct. (Hay, 3969–71, 3974, 3990–91)

206. In terms of price competition, Dr. Hay separated the time frame covered by the complaint into two periods. The period prior to the end of 1977 was described by Dr. Hay as one of "extremely limited" price competition. (Hay, 3790) In reaching this conclusion Dr. Hay relied on certain characteristics of the market: that "list prices moved virtually in lock step throughout the period" (Hay, 3790); and that "with some significant exceptions there were no deviations from those list prices." (Hay, 3791) He testified that "there are indications that price performance improved significantly after the end of 1977", but he further stated that there was still "some indication that price competition had not reached what I have described as full flower even during that period." (Hay, 3799)

207. Dr. Hay noted that the pricing behavior could have an alternative explanation—that it was "the result of intense price competition in an industry characterized by a homogenous product," but he did not believe this was the proper explanation for the price identity. (Hay, 3791–93) According to Dr. Hay, [**109**] the structural characteristics of the market in conjunction with the industrywide use of the

challenged practices, interacting together, have had an impact on competition in the antiknock compound industry. (Hay, 3785, 3908, 3929, 3993, 4068) Absent an oligopoly structure, the facilitating practices would be ineffective. (Hay, 3990–91) He concluded that the four challenged practices operated to reduce uncertainty about a competitor's actions and reactions and that the overall result was likely to reduce the vigor of price competition in the marketplace during the relevant time period. He stated that he was not testifying as to the effect of these practices after mid–1979. (Hay, 3874) He testified further:

> It's my opinion, summing up, all of the defects that I described, that these practices did operate to reduce uncertainty about rivals' actions and reactions. That reduced uncertainty diminished the risk to one firm of initiating a price increase or maintaining an otherwise high price and the overall result was likely to reduce the vigor of price competition in this marketplace during the period we have described. (Hay, 3847)

208. Dr. Hay defined facilitating practices as ". . . certain practices, employed by producers, which have the effect of facilitating on the one hand the matching of list prices and on the other hand increase the disincentives to provide discounts off list." (Hay, 3810) They are practices that are avoidable. (Hay, 4293–94) He described the facilitating practices in the lead antiknock industry and how they operated:

> Q. Can you explain how the—strike that. Do you understand the practices challenged in this case as being potentially facilitating practices?
>
> A. Yes, I do.
>
> Q. Could you explain how they could operate in this market?
>
> A. Well, briefly, the way I would explain it would be the following: the announcement —let's talk in terms of the communication to the press would be one way of either informing rivals of the fact and the amount of a list price change or if not being the first source of information, confirming what your rivals might have learned from other sources.
>
> I think here the really two critical aspects are the certainty with which you can make an inference from what you learn from customers and the timing. How quickly are you sure what has happened? [110]
>
> The advance announcement that seems to me makes it possible for all of those list price changes to go into effect on the same—at the same time. That is to say, no one producer is out there in the marketplace with a higher price in effect than his rivals.
>
> The uniform delivered price quoting in terms of uniform delivered price has, I think, generally the effect of simplifying the whole communication mechanism. That is to say, instead of communicating perhaps 150 different prices for 150 different customers' locations, there is one price that has to be communicated.
>
> In addition, it is at least possible that the uniform delivered price relates to the incentives of discounting. I think it is possible that when a firm is considering a discount it might be concerned, first, obviously that its rival will learn about the terms of that transaction. But secondly, will react differently depending upon whether it is unequivocally clear that that is a discount off the list price or simply some perhaps error in calculating the appropriate list price.

Now, it seems to me the fact that prices are quoted on a uniform delivered price basis seems to remove any doubt that if you learn about the fact of a transaction, you learn that the transaction was at so many cents, it is pretty unequivocal that that was in fact a discount and not simply an error perhaps in calculating transportation costs.

Finally, the most favored nations clause I perceive acts roughly in three—three different ways. First of all, it reduces the incentive of any one firm to provide a discount, really for two reasons: one is to the extent a discount given to one firm has to be spread to other customers, perhaps some of those customers you could or would have sold at the list price, that would reduce the profitability of a particular price discount.

Secondly, to the extent that extending that discount makes it more likely that the fact of the discount will be noticed by your competitors, that again reduces the attractiveness of engaging in a discount off list.

The second possibility is that to the extent that each firm is aware that the other one has such a [111] clause, it might take some assurance—it might take some additional assurance that that firm is not going to be giving a lot of discounts. It might behave differently. It might have more confidence in initiating price increases or adhering to otherwise high prices.

Finally, the third point that struck me in perusing the record, that these most favored nations clauses seemed to be used on occasion to suppress customer reaction to high prices and say well, we can't give you a discount. We have this most favored nations clause. We have to give it to everybody else.

So it seems to me that generally speaking, these facilitating practices can have the effect of making it easier to—making it easier to match list prices and increasing the disincentive to deviate from list prices.

(Hay, 3811–14)

209. Dr. Hay stated that even without the use of these practices there would not be "perfect competition" in an industry with the structure of the antiknock compound industry, but he believed that "a difference" would be made. (Hay, 3826) He stated:

The point I was making, I don't mean to suggest that there were no discounts during the period that I studied, simply my belief that the overall level of performance was likely to have been changed as a result of eliminating the facilitating practices. How much of it changed? I think that is the—as Mr. Gribbon suggested earlier, that is a significantly more difficult problem.

I think it is virtually impossible to measure as an economist the amount by which—I mean I can describe how the processes would have changed. I can describe why the incentives would have changed, and why those changed incentives are likely to lead to different behavior. I think it's virtually impossible for an economist to measure the amount by which price performance would have improved.

I can offer simply an opinion. I don't think it would have brought this industry to the textbook model of perfect competition. Not by a long shot. That is, even take away the facilitating practices, you are not going to produce perfect competition in an industry of this structure. Would it have made any difference? I think the answer is yes. It likely would have made a difference.

But I feel that I am unable to measure, with any degree of claim to precision, how much of a difference it [112] would have made. How much of the distance you would have covered from the price performance I discussed to the level of what might be characterized as intense price competition.

(Hay, 3825–26)

210. Dr. Hay testified about the services furnished by respondents to refiners:

Q. You talked a little bit about some price competition in this market. Dr. Hay, do you have an opinion as to whether the Respondent firms did compete for additional business?

A. Yes. There seems to be a strong suggestion in the record that firms were interested in picking up additional business. And did use various methods of competition to obtain additional business.

Now I would generally—aside from the cash discounts I mentioned earlier, I would generally characterize those as nonprice methods of competition, recognizing that those nonprice methods really fall along a spectrum. When you get to one end of the spectrum, there may be a degree of arbitrariness and whether you describe it as price or nonprice—let me see if I can illustrate it.

Suppose that I say if you buy from me 1000—just keep the numbers simple, $1000 worth of antiknock compound. I will give you a voucher for $500 and you can use that voucher to buy something that you had already ordered, perhaps totally unrelated to the antiknock business.

Q. Slow down.

A. Perhaps some computer time sharing service that you had already decided to order and hadn't placed. I will simply give you a voucher which you can use to pay that bill. It seems to me, whatever label one puts on that, that is virtually indistinguishable from a direct reduction in list price.

However, as we get further along the spectrum, I think it's increasingly distortive to characterize the concessions as a form of price competition. As I think we get increasing along the spectrum, the concessions take the form that in order to benefit from the concession, you have to do something that you might not otherwise have done. [113]

Now consuming a certain service, a buying of some services from an approved list of consultants or something of that order.

Now I don't deny and the record seems clear, that refiners place a value—I mean they don't regard most of those offers of concession as valueless. It simply seems to me to be a confusion in terms to describe that as price competition.

Simply the fact that a customer may place a—may have a value to a concession, it seems to me does not say that is price competition. I use the analogy of restaurants where all of the restaurants in the city of Washington—maybe I am a little out of date—all of the restaurants in the city of Washington agree to fix a price of a meal at $25 but they compete on how big a portion they give you. Well, I wouldn't deny the fact that large portion may be of some value to the consumer. I simply regard it as a confusion in terms to describe that as price competition.

So it's my impression that there are a variety of forms of ways for competing for business, some of them appear to be quite close to what you might describe as a direct cash reduction, others I think are much more appropriately characterized as nonprice competition. (Dr. Hay, 3826–28)

* * * * * * *

JUDGE BARNES: Are the use of services in this industry an indicia of a lack of price competition?

THE WITNESS: Well, certainly one wants to put that in context. It's certainly not at all surprising that when list prices are uniform, and to the extent that there are no cash discounts off list, firms compete on the basis of services. And so it's certainly the fact of services, and the providing of services is certainly not inconsistent with the fact that price competition has been diminished.

One often expects to find service competition in an industry in which price competition has been eliminated. A classic example is the airlines. When the CAB fixed the rates, they competed by offering more flights or bigger martinis or Frank Sinatra, Junior, playing in the lounge of the 747.

I don't think it's at all inconsistent except from that some services, what generally seem to be [114] described as the really narrow safety services, seem almost an inevitable part of the product. And even in a competitive environment, those narrow class of services probably would have been offered anyway as part of the product.

But these other kind of services I think, in a truly competitive environment, you would have expected to see them not offered as a part of the product, perhaps offered by the same companies at a price, or offered by independent companies to those who wanted to buy it.

(Hay, 4374–75)

211. Dr. Hay was also of the opinion that PPG's and Nalco's use of the facilitating practices had an impact on price competition in the antiknock market. PPG's and Nalco's participation in price announcements and uniform delivered pricing contributed to the maintenance of a price structure which was less competitive than it would have been. If PPG and Nalco had not followed Ethyl's and Du Pont's price increases, had not responded or made no announcement whatsoever, the price increase would have had to be rolled back. Nalco and PPG benefited from the price increases because their prices were keyed to the list prices of the industry. (Hay, 3832–34, 4220, 4223–24)

212. Finally, Dr. Hay was of the opinion that eliminating the practices would "increase the vigor of competition":

I believe that absent these facilitating practices, it is likely that there would have been an improvement in the competitive performance. Because of that conclusion, I infer the likelihood that eliminating those practices today may increase the vigor of competition or the speed with which vigorous competition is achieved.

(Hay, 3837)

* * * * * * *

JUDGE BARNES: In other words, is the impact—in your opinion, has the impact been substantial here on prices?

THE WITNESS: I think the way I have testified, and let me elaborate just a bit on

that, I think it is impossible to measure with any claim to precision, how much better it would have been absent the facilitating practices. [115]

I think there are something like two poles. I have no reason to believe you would have been at either of those poles. One pole is you would have gone all the way to perfect competition. That I don't think would have happened, given the structure of this industry, notwithstanding some testimony to the effect that this industry has aspects of instability if price competition breaks out. I don't think you will get anything like the textbook ideal.

By the same token, I had no evidence to lead me to conclude that there would have been no change whatsoever. There would have been a noticeable change, a significant change.

But how large a change, whether you would have gone 75 percent of the way or 60 percent of the way, I can't claim to make those kinds of predictions. I think it would have been noticeable and predictable, but I can't tell you how far it would have gone to improve price competition.

(Hay, 4372–73)

B. *Dr. Jesse W. Markham*

213. Dr. Jesse W. Markham was called as an economic expert by respondent Ethyl. He is a professor of business administration in the Graduate School of Business at Harvard University (Markham, 6759; REX 326), and a former Director of the FTC's Bureau of Economics. (Markham, 6763) Dr. Markham's primary field of specialization is industrial organization. (Markham, 6760)

214. Dr. Markham testified that it is possible to predict from certain structural characteristics the amount of competition that can be expected in an industry, and that the amount of competition he understood to exist in the antiknock compound industry was actually somewhat greater than what his structural analysis predicted. (Markham, 6808–09, 6858, 6907, 6923) The competitive performance in the antiknock industry can be explained by the structure of the industry and the nature of the product. (Markham, 6824–25) Consequently, he concluded that the facilitating practices could have had no effect on the market. (Markham, 6808–09, 6824, 6830, 6857–58, 6861, 6894) Dr. Markham testified that his belief that the practices have had no anticompetitive effect is buttressed by his understanding that "the history of their appearance would suggest that they were given in response to what buyers perceived to be some value . . . rather than having been designed somehow or another to facilitate oligopolists communicating with each other." (Markham, 6821)

215. Dr. Markham examined market shares, market share changes and rank changes in the antiknock compound industry for [116] the 1948–79 period and concluded that there was "enough turbulence in those shares to at least consider them as strong corroborative evidence that these four firms were competing with each other," since stable market shares are an indication of a poorly performing market. (Markham, 6801–02, 6874) Dr. Markham testified that profits are an

important measure of the degree of competition (Markham, 6828, 6924–25); however, the only profit data available to him were the replacement cost accounting or new investment studies by Ethyl and Du Pont. (Markham, 6803–04, 6878; Skylar, 4805; Merkel, 5256–57; REX 321A-Q, 322A-U; RDX 335) Mr. Markham concluded that he was unable to obtain what he considered to be reliable, comparable benchmark profit figures, and thus he gave little weight to the replacement cost studies in his analysis. (Markham, 6804–05, 6879–80, 6924–25) He did consider the profit data submitted by Ethyl and Du Pont, not by comparison to a benchmark, but rather by comparison to what he loosely described as the "cost of capital," which he admitted was less satisfactory than profit comparisons. (Markham, 6803–04, 6925)

216. Dr. Markham relied on his understanding of the extent to which the respondents used various price and nonprice avenues of competition as indicia of performance equal to or better than he would expect from the industry's structure. These elements included discounting, advance buying, credit terms, undercutting on price increases, and competition in the provision of "free" services. (Markham, 6791–99) Dr. Markham testified that the degree to which these methods of competition compensated for the admitted lack of what he called "list price competition" could not be accurately measured, and he therefore had no way to compare the extent of competition he observed with what he should have expected. (Markham, 6791, 6863–67) He did note, however, that "you don't have one firm 85% discounting on an agreement to stick by list price." (Markham, 6920) Dr. Markham testified that he would not expect "list price" competition in the antiknock industry, but would expect competition to occur in forms less readily detectable. (Markham, 6790–91, 6809) He believed that price differentials among refiners or between respondents could not be kept secret. He stated, however, that if a discount were selective, it would be more difficult to detect than a price change which is extended to a larger group generally. (Markham, 6786, 6897)

217. Dr. Markham concluded that delivered pricing does not reduce uncertainty about rivals' prices because freight costs are too small to be significant. (Markham, 6813, 6809) Dr. Markham believed that elimination of a uniform delivered price system would have no effect because rivals' freight costs would be easy to calculate and matching would occur. (Markham, 6814–15, 6894) Dr. Markham testified that the most favored nation clause was merely a "shadow effect" of industry practice and corporate policy which would be followed regardless of whether the contracts expressly set out such a clause. (Markham, 6819, 6896) [117]

218. Dr. Markham did not criticize the theory of the complaint, and he could "conceive circumstances" where the practices, or the types

of practices, challenged in the complaint could have the effect of reducing uncertainty or limiting competition in an industry. (Markham, 6916) His disagreement was with application of the theory to the lead antiknock compound market. (*Id.*)

C. *H. Michael Mann*

219. Dr. H. Michael Mann is an economic expert called by respondent Du Pont. He is a professor of economics at Boston College, and a former Director of the FTC's Bureau of Economics. (Mann, 5392; RDX 342)

220. Dr. Mann stated that the structure of an industry is the most important influence on pricing behavior. (Mann, 5409–08, 5410) He listed four structural characteristics which he felt should always enter into a market analysis; the number of firms, or concentration, the nature of the product, [homogeneous or heterogeneous], barriers to entry, and elasticity of demand. (Mann, 5429) While the basic structural facts are necessary for a prediction of pricing behavior, they alone are not sufficient. (Mann, 5456) There are additional "environmental" characteristics which could alter pricing behavior and result in an outcome different from that predicted from structure alone and must be taken into account. (Mann, 5455–56, 5566)

Dr. Mann stated that the complaint charges that the challenged practices have reduced uncertainty and ultimately the level of price competition. He acknowledged that the effect uncertainty has on the level of price competition in an industry requires an examination of the particular factual context in which such an allegation is made. (Mann, 5401–04)

221. In Dr. Mann's analysis of industry structure, elasticity of demand plays a critical role. Dr. Mann testified on direct examination that the demand for lead-based antiknock compounds exhibited a "considerable amount of inelasticity." (Mann, 5429) This inelasticity was one of the structural characteristics which led him to expect that prices in the antiknock market would be "fairly close to a monopoly price," such that the challenged practices could be expected to have little effect on observed economic performance. (*Id.*) In Dr. Mann's opinion, the industry structure, homogeneous product, no serious possibility of entry, and inelasticity of demand all created a favorable environment which would have permitted price behavior fairly close to a monopoly price. (Mann, 5429–31) However, based on Dr. Cantwell's value-in-use charts and tables (RDX 332A-I), Dr. Mann concluded that "the actual price of antiknock is considerably below what a monopoly would charge under profit maximizing assumptions." (Mann, 5421–[118]26) He also concluded that not only were the practices challenged in this proceeding unlikely to have any competitive

effect, but that the market was performing better than he would have expected. (Mann, 5429, 5431–32, 5638) He found no evidence that the challenged practices have reduced price competition in the antiknock compound industry. (Mann, 5410)

Dr. Mann testified that prices in the antiknock compound industry were above the competitive level for the period 1974 to 1977. (Mann, 5440–41, 5583) He added that prices have fallen after 1977, and "if prices aren't at a 100–firm easy-entry level, they are clearly tumbling in that direction, and probably I would suspect by now, may be hovering there." (Mann, 5434) Regarding the situation in mid–1980, he found that "the degree of price competition seems to be very vigorous." (Mann, 5436) Dr. Mann's opinion with respect to this industry was predicated on the belief that after 1977, *all* of the manufacturers discounted, and that such discounting was "inevitable." (Mann, 5674–75; 5683–84)

222. Dr. Mann acknowledged that respondents' practices with respect to announcing price changes convey information (Mann, 5643), and on cross-examination he stated that an increase in information, the speed of conveyance, and the advance nature of the information all can reduce uncertainty about rivals' actions and might inhibit price differences resulting from differing views of what price to charge. (Mann, 5644–46) He argued, however, that prohibiting the practices would have little effect, since the producers would be able to find "another way to skin the cat." (Mann, 5648) Dr. Mann based his opinion that elimination of the advance notice to customers would not have any beneficial impact on competition, in part, on testimony of refiners that they liked advance notice. (Mann, 5639–41)

Dr. Mann testified that the use of most favored nation clauses had no impact on the antiknock compound market. He stated that he could find nothing in the record to indicate that use of most favored nation clauses had any impact on the respondents' resistance to pricing deviations. As he stated, "there wasn't really any place I would turn to do my own examination as to whether I thought the record was supportive." (Mann, 5659) He did indicate the type of documentary evidence that could change his belief. That evidence would include recognition by a respondent that most favored nation clauses play a role in maintaining a symmetric viewpoint among the respondents and the respondents' use of such contractual clauses in rejecting requests for price discounts. (Mann, 5664–65) Dr. Mann testified that even if the practices were found to have an anticompetitive impact, enjoining them would have no effect because other practices would take their place. He gave as an example the use of most favored nation clauses, testifying that in their absence, Du Pont's and Ethyl's sub-

stantial price [119] uniformity would probably continue unabated because of "the presence of the Robinson-Patman Act." (Mann, 5437)

Dr. Mann concluded that the use of delivered pricing had no effect in the antiknock compound market. He testified that if all the manufacturers practiced and adhered to a uniform delivered pricing system, it would contribute to reduced uncertainty, but, he added that "I have not seen any evidence that persuades me that that's the case." (Mann, 5671–72)

Dr. Mann did not examine alternative pricing systems to determine whether they would communicate as much information as the present uniform delivered price system, or whether the quality of information would be lower and, consequently uncertainty greater, if the present system were prohibited. (Mann, 5677–78)

223. Dr. Mann concluded that elimination of the challenged practices would not have any impact on the level of price competition and would not increase such competition because "conduct relief" will not alter the structural conditions in the industry which are the factors that determine price competition. (Mann, 5436–37) He also testified that the elimination of delivered pricing would not have any substantive effect on competition in the industry and would remove an efficient price scheme which would be replaced by an alternative that would cost more to administer. (Mann, 5437–38) Dr. Mann concluded that the vigor of price competition has increased since May 1979, even though the challenged practices were being utilized, because of the decline in demand for antiknock compounds. (Mann, 5414–16, 5634) In Dr. Mann's opinion, the decline in demand post–1977 is the factor most affecting price after 1977; prior to 1977 sophisticated buyers kept prices in line. (Mann, 5432–34)

224. Dr. Mann also testified that the most common measure used to determine whether a market price is above the competitive level is return on investment. (Mann, 5591) He would use the average return on investment in a general industry grouping in which the business is engaged, multiply that average by one and one-half, and that would be a benchmark. (Mann, 5596, 5598–99, 5601) He would use a five-year average to get some idea of long-run tendency. (Mann, 5602) Dr. Mann would use the FTC's Quarterly Financial Report to calculate an industry benchmark. (Mann, 5609)

D. *Michael L. Glassman*

225. Michael L. Glassman testified as an economic expert for respondent PPG. He is vice-president of Glassman-Oliver Economic Consultants, Inc., a Washington, D.C. economic consulting firm (Glassman, 5994; RPX 1518), and a former Assistant Director of the FTC's Bureau of Economics. (Glassman, 5997) [120]

226. Mr. Glassman testified that there is price competition in the antiknock industry based on direct discounts, across-the-board price cuts, the extension of credit, and the provision of services. He concluded that the industry has performed competitively; that there was a mix of price and service competition—sellers being responsive to buyer needs, which suggests the market is behaving competitively. (Glassman, 6014, 6064–69, 6075) He testified that the challenged practices have had no effect on competition in the antiknock industry:

> It is my conclusion, and I think Professor Hay agrees with this, that since the industry was competitive, one shouldn't worry about the effects of the practices. But even if one were to argue that the industry was not performing in a competitive fashion, and viewed those practices independently, one would have to conclude that those practices have not facilitated a lessening of competition.

(Glassman, 6013)

Mr. Glassman testified that PPG and Nalco ". . . have been, since their entry in the early '60s, substantial and significant pro-competitive forces in the antiknock compound industry." (Glassman, 6012) As new market entrants they acted independently and injected competition into the industry. The market behaved competitively and prices were lower because of the new entrants. (Glassman, 6030–31)

227. Mr. Glassman testified that public announcements of price changes do not facilitate maintenance of noncompetitive prices. This conclusion was based, *inter alia,* on (a) the fact that respondents receive information about competitors' price moves from customers; (b) a study he performed, from which he concluded that articles about price changes did not appear immediately in the trade press and, indeed, that the lag between announcement and publication was as long at 13 days; and (c) his belief that competition became no more intense after public announcements were discontinued in 1977. (Glassman, 6138–43; RPX 1523A-B) However, on cross-examination, Mr. Glassman stated:

> [I]f you read it in the newspaper, and especially a trade publication, it will improve your confidence somewhat that that is actually what is happening in the world. [121]
>
> It's another source of information, and like any other source of information, the more you know about a subject, the more confident you are about your conclusions.

(Glassman, 6560)

228. Mr. Glassman concluded that the respondents' practice of giving advance notice of price increases is a procompetitive practice and an important method by which rivals compete. He believed that the practice diminishes certainty rather than increases it; that there was no industrial organization literature suggesting the practice has any

anticompetitive aspect. A study, presented through RPX 1524A-G, confirmed his beliefs. This study showed that advance notice of price increases is very common in the chemical industries, and that there is no apparent correlation between the amount of advance notice given and industry concentration. (Glassman, 6151) Mr. Glassman also relied upon Ethyl's adoption of the practice of giving advance notice when it was still a patent monopolist. (Glassman, 6146–55) He did not make a determination as to the relationship between advance notice and the frequency of price change attempts. (Glassman, 6565)

229. On the practice of uniform delivered pricing, Mr. Glassman testified that he had conducted a study to compare freight costs to total charges in this market, and in a number of other industries. (Glassman, 6159–64; RPX 1525A-F) He found that the .5% to 2.75% proportion of freight cost to total delivered antiknock compound costs was well below the average for all manufacturing, and he concluded that there was no resource misallocation (a result of poor performance) caused by delivered pricing in this industry. (Glassman, 6159–64) However, he did state that uniform delivered pricing could facilitate competitors' arrival at identical list prices (Glassman 6521), and could facilitate competitors' matching of transaction prices. (Glassman, 6524–25)

230. With respect to the use of most favored nation clauses, Mr. Glassman testified that he could not recall any evidence that this challenged practice had an adverse competitive impact, but that had he concluded differently "I would have perhaps said that to a very limited extent, the existence of a most-favored nations clause could have added just a tiny bit to the possibility that there would be no price discounts." (Glassman, 5607–08) He testified, however, that most favored nation clauses gave Ethyl and Du Pont "an excuse, for not having their price structure broken down", and that "[t]he absence [sic] of a most favored nations clause in PPG's business helps them compete because they don't feel at all [122] constrained in terms of giving special deals and discounts." (Glassman, 6512–13, 6514–15) Mr. Glassman further added:

> No doubt, if you have a clause in your contract, and you can create a cause of action and have someone sue you for doing something you promised not to do, then that is going to be a deterrent to doing something . . . [S]o in that sense it would be easier to compete without the most favored nations clause.

(Glassman, 6515)

231. Mr. Glassman concluded that the challenged practices have not facilitated a lessening of competition in the antiknock industry. (Glassman, 6013, 6132) In reaching this conclusion he relied on several factors: (1) the respondents have different goals and pursue differ-

ent strategies to achieve them (Glassman, 6026–30; 6211–12); (2) special price discounts are kept secret (Glassman, 6032–39); (3) price changes are frequent (RPX 1520A-C; Glassman, 6075–78); (4) there is an absence of any cartel-like institutions to act "as a stabilizing influence on industry pricing in order to maintain noncompetitive levels of pricing" (Glassman, 6086, *see also* 6085–89); and (5) there are "sophisticated, knowledgeable buyers. . . . [whose] activities have imposed a competitive discipline on this market." (Glassman, 6100–02)

232. Mr. Glassman did not regard the Robinson-Patman Act as an "inhibiting force" in the industry. (Glassman, 6138) He stated that elimination of public press announcements and most favored nation clauses would have no effect on competition. (Glassman, 6013) The elimination of advance notice of price changes would cause a reduction in competition. (Glassman, 6013) He testified that one effect of elimination of uniform delivered pricing could be ". . . to create a little bit of local monopoly power" around the plants of particular antiknock sellers. But generally, the major effect would be to "reduce somewhat the efficiency in selling antiknock products." (Glassman, 6014) He also stated that the regulatory nature of relief would cause "rising costs" and deprive the industry of "efficiencies." (Glassman, 6014) **[123]**

E. *Dr. Dennis W. Carlton*

233. Dr. Dennis W. Carlton was called as an economic expert by respondent Nalco. He is a professor of economics at the University of Chicago Law School and a vice president of Lexecon, Inc., an economic consulting firm. (Carlton, 6944; RNX 1594)

234. Dr. Carlton listed certain structural factors that he believed explained performance of the antiknock compound market: the industry is concentrated—there are only four producers—two of the producers are large and have similar production processes; the product is homogenous; there is free and rapid flow of information from refiners to producers; demand is inelastic and government regulations will create declining demand; and there are large and sophisticated buyers. (Carlton, 6959–60) He also believed that Ethyl and Du Pont had similar costs of production. (Carlton, 6959, 7067–71) He did note, however, that the greater the differences in their production costs, the more difficult it would be for the antiknock compound industry to achieve a noncompetitive price. (Carlton, 7068–69)

235. Dr. Carlton stated that the benefits of a price discount to get more business versus the potential loss that would be imposed by an across-the-board price cut tend to create an incentive for firms with large market shares to avoid price discounting and to behave in a parallel fashion with little discounting. Small firms' benefit from a

price cut may be large relative to potential losses from an across-the-board price cut. Expansion of business may be more important to small firms. Thus, you expect limited price discounting and parallel behavior from large firms and greater discounting from small firms. (Carlton, 6962–63) Dr. Carlton stated that market performance is reflected by "anything that measures how well markets are responding to consumers." (Carlton, 7136)

236. Dr. Carlton identified the relationship between price and the marginal cost of manufacturing and selling antiknock compounds as an indication of the industry's performance. (Carlton, 7136) However, he was unable to determine marginal cost in this case. (Carlton, 7141–43) He did state that the difference between Nalco's price and its average cost is diminishing "very rapidly" and is "certainly trending toward whatever your concept of marginal cost . . . is" based on extrapolation of Nalco's decline in gross profits between 1978 and 1979. (Carlton, 7143) On redirect examination, Dr. Carlton made it clear that "I didn't mean to place any undue reliance on it [the extrapolation]. I just mentioned it." (Carlton, 7292–93) Dr. Carlton later testified when recalled as a witness and after certain profit data was presented, that he could infer that prices were above marginal [124] cost. (Carlton, 7971) He testified further, when recalled, that once you determine price is above marginal cost "[Y]ou have to go on and analyze the features of the industry, structural features, as well as the practices, in detail to see how far that interacts in the industry and how that affects price-setting behavior. (Carlton, 7977; *see also* F. 168)

237. Industry profitability was also identified as an indication of performance to the extent that it showed whether there were incentives for further expansion or contraction. (Carlton, 7136–37) Dr. Carlton's impression was that ". . . this isn't a terribly profitable line of business from Nalco's point of view, . . .", and that profits were ". . . well below the average rate of return to manufacturers," (Carlton, 7156), although he did not do a specific study of profits for each year. (Carlton, 7161)

238. Dr. Carlton testified that the challenged practices "don't have the effects that have been alleged in the complaint;" that the challenged practices have had no effect on the level of competition. (Carlton, 6965, 7054–55) He believed that there was no link shown in this industry between the challenged practices and any reduction in price competition and, instead, that "the structure of this industry explains quite well the subsequent industry behavior." (Carlton, Tr. 7043, 7045–46, 7065–66, 7307) He stated, however, that the greater the flow of information in an oligopoly, the greater the likelihood that price will be above the competition level. (Carlton, 7054–55) He acknowledged that the practices in some other industry could have the effect of

increasing the flow of information and thus reducing the level of competition. (Carlton, 7055–56) He also testified that anything that makes it more difficult to learn a rival's transaction price will make it more difficult to have parallel behavior. (Carlton, 7107)

239. In Dr. Carlton's opinion, advance notice of price increases to customers and the issuance of press releases have not transmitted information in a way that reduces uncertainty about rivals' actions or competition. He relied on the belief that customers were the primary source of price information to the antiknock compound suppliers. (Carlton, 6965–66, 6969) Dr. Carlton also relied on the fact that the 30-day advance notice clause only applied to increases and not to decreases, while observing no greater difficulty in the matching of list prices when there was a price decrease. (Carlton, 6966–67) He testified that refiners could have different incentives to reveal a decrease:

> Obviously, there necessarily might be a difference in incentives from the explanation I just gave you. I am not saying there couldn't be. And I'm also stressing I haven't spoken with the refiners.

(Carlton, 7229) **[125]**

Dr. Carlton also noted that valid empirical work about the impact of advance notice was not available, since it would require comparison of one period with, and one without, advance notice. (Carlton, 7231–32)

240. Dr. Carlton testified that press releases about price increases had no market impact since there was no change in the uniformity of list prices after the end of 1977, when press announcements were stopped. (Carlton, 6968–69)

241. Dr. Carlton believed that the practice of quoting prices on a uniform delivered basis had no adverse competitive impact because of two basic reasons: rail freight charges are easy to calculate, and freight is a small component of total price. (Carlton, 6969–71, 7171–72, 7188–89, 7193–94) Dr. Carlton acknowledged that a uniform delivered pricing system transmitted information to rivals:

> To the extent that you believe that everybody is being charged a uniform delivered price, then if you know the price that one customer is paying, you know the price that other customers are paying . . . (Carlton, 7178–79)

Dr. Carlton believed that calculating rivals' freight costs is easy and, as a result, use of an F.O.B. manufacturing-site system would not increase uncertainty. (Carlton, 7171–72) Dr. Carlton testified that if a delivered price is replaced by an F.O.B. price plus freight, and the freight is very easy to determine, then there is no reason why the transmission of information under an F.O.B. price system would be

any different from that under a delivered price system. In this industry, since the freight cost is so simple to compute because it is by rail, no greater uncertainty would result from the adoption of an F.O.B. manufacturing-plant plus freight system. (Carlton, 6970–71)

242. Dr. Carlton opined that use of most favored nation clauses by Ethyl and Du Pont could not have had any competitive impact since Ethyl was not constrained from granting a discount. (Carlton, 6971–72) He also felt that neither Ethyl nor Du Pont obtained any comfort from the other's use of this contractual provision. (Carlton, 7222–23) He did agree, however, that Ethyl and Du Pont had a substantial need to have accurate information about each other's actions. (Carlton, 7221)

243. Dr. Carlton emphasized what he terms the "special facts" as to Nalco which prevent Nalco's use of the challenged practices from having any adverse effect on competition. He also stressed the opinion "that Nalco has been a very procompetitive force in the industry" and to the extent the **[126]** relief will pose a hardship on Nalco, competitive harm would be done to the industry. (Carlton, 6958–59) Dr. Carlton explained that he considered Nalco a "very competitive force" because of its entry, expansion, and particular pricing policies. (Carlton, 7254–55)

XI. CONCLUSIONS

A. *Allegations of the Complaint*

The complaint in this proceeding challenges four marketing practices used by respondents between 1974 and 1979:[1] thirty-day advance notice of list price changes to customers; issuance of releases on these price changes to the press; sales made on a uniform delivered price basis; and use of most favored nation clauses in contracts. The use of these practices is alleged to have the effect of reducing uncertainty in the lead-based antiknock compound market thereby facilitating price uniformity.

Specifically, advance notice of list price increases before their effective date is alleged to promote price uniformity by giving a price increase initiator time to "test" the market to see whether the price change will stick and whether rivals will follow the price move. As a result, list price changes go into effect at the same time and in the same amount and price competition is reduced or eliminated.

The issuance of releases to the press concerning pricing moves is alleged to contribute to market stability by providing increased infor-

[1] The complaint issued May 30, 1979; the investigation which preceded issuance of the complaint was announced January, 1978.

mation exchange on list price changes, and on competitors' reactions, thereby reducing uncertainty in relation to price changes.

The use of uniform delivered pricing is asserted to facilitate uniform pricing in the lead antiknock compound market by removing variables in freight rate calculations. As a result, competitors are better able to predict their rivals' prices and to match them.

Finally, because most favored nation clauses require that a lower price given to one customer must be given to any customer with such a clause in its contract, it tends to discourage discounting off of list price. To the extent that **[127]** one company knows that another company uses the clause it can estimate the extent of discounting from the published list prices and engage in price matching.

There is no allegation in the complaint that respondents have agreed or combined among themselves to engage in the use of these practices. (*See* Complaint Counsel's Response to Interrogatories of Ethyl Corporation, filed February 11, 1980, at 33.) Indeed, PPG is not charged with the use of the most favored nation clause in its contracts. Nor is there any allegation in the complaint that the challenged practices were adopted with the intent to reduce or suppress competition. It also is not alleged that these marketing practices are in themselves illegal or *per se* unreasonable. (Complaint Counsel's Brief at 6, [Vol. II]) The essence of the complaint is that through the use of these marketing practices, not in themselves unlawful,[2] respondents were able to reduce uncertainty in the lead antiknock compound market and maintain price uniformity and stability. As a result, competition was lessened contrary to the strictures of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

B. *Economic Concepts and Oligopoly Structure*

Industrial organization economists recognize that structure plays a significant role in the behavior and performance of a particular industry and the economic experts testifying in this proceeding were in general agreement with this concept. (Mann, 5407–08, 5410; Markham, 6767; Carlton, 6964; Hay, 3803–05; F. Scherer, *Industrial Market Structure and Economic Performance* 9–12 (1980))

Markets lie along a continuum. At one extreme is the perfectly competitive industry where there are a large number of small sellers and their price and production decisions do not influence market performance, and there is total independence. (Mann, 5418; Scherer, at 11, 13; Chamberlain, *The Theory of Monopolistic Competition* 7 (1965)) Where there is competition, the price of a product tends to be bid down by the sellers to its cost. (Posner, *Natural Monopoly and Its*

[2] The practices challenged in this proceeding have been utilized in the lead-based antiknock compound industry over many years, and are prevalent in other industries.

Regulation, 21 Stan. L. Rev. 548, 550 (1969)). At the other extreme is monopoly where one firm accounts for the total output and sales of a product in the market and it unilaterally determines price at a level to maximize profits. (Markham, 6771–72; Scherer, at 11, 16) [128]

Between these two extremes is oligopoly where there are few sellers who account for all or nearly all of the product output in a given market. (Scherer, at 11; J. Bain, *Price Theory* 80 (1966)) Oligopoly is characterized by interdependence among sellers. Each realizes that a price cut by it will affect sales of the others and evoke prompt matching responses. The result is lower profits for all. (Posner, at 550) Production variations and market actions by one will have repercussions on prices and the sales of all. (2 Areeda & Turner, *Antitrust Law* Section 404a, at 272–73 (1978); Bain, at 70; Chamberlain, at 47) Bain notes two conflicting goals of oligopolists: (1) the desire by all for joint profit maximization; and (2) the desire by each to increase its market share. These disparate goals create uncertainty as to the competition's reaction to any pricing decisions. (Bain, at 278–79) This uncertainty creates a downward pressure on prices. (Areeda & Turner, at 231)

As a result, oligopolists have an incentive to increase interdependence and maintain prices at a profitable level. Recognition of this interdependence depends on a number of factors: the number of sellers in the market and the threat of new entry; homogeneity of the product; similarity of product cost and distribution systems; equality of market shares; the extent to which price concessions are made and kept secret; elasticity of demand; and frequency of sales transactions. (Scherer, at 199–225) Disruptive influences complicate the oligopolists' ability to maximize profits and include such factors as product complexity; secret price concessions and infrequent or "lumpy" transactions; differences in market share, costs or capacity utilization; and declining demand. (Mann, 5457; 2 Areeda & Turner Section 404b2, at 274–76) As interdependence increases, sellers must make assumptions about rivals' behavior and there is more incentive to cease rivalry and to coordinate activity to maximize profits. (Chamberlain, at 46–51; Areeda & Turner Section 404, at 273)

Certain devices aid oligopolistic coordination—overt and covert agreements; communications systems; price leadership; and pricing through use of formulas or "rules of thumb". (Scherer, at 169–197) Coordination is less difficult when oligopolists can communicate freely and openly. (Scherer, at 190) Such exchanges of price information have two economic effects: (1) they can improve economic efficiency; and (2) they can create further interdependence among sellers and facilitate price coordination. Note, *Antitrust Liability For and*

Exchange of Price Information - What Happened to Container Corporation?, 63 Va. L. Rev. 639, 640 (1977).

C. *Legal Standard*

The four marketing practices of the respondents are alleged to facilitate price uniformity and stability within the [**129**] lead antiknock compound market and are therefore unfair methods of competition within the meaning of Section 5 of the FTC Act. Respondents argue that Section 5 is not appropriate to attack non-conspiratorial oligopolistic performance and therefore the complaint fails to state a cause of action.

Section 5 has been construed to reach a variety of market activity. First, actions which violate the letter of the antitrust laws may also be condemned under Section 5 ". . . since nominally that section registers violations of the Clayton and Sherman Acts." *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609 (1953); *see also FTC* v. *Cement Institute,* 333 U.S. 683, 690–94 (1948); *Fashion Originators Guild* v. *FTC,* 312 U.S. 457, 463 (1941). Section 5 also reaches activities which threaten incipient violations of the Sherman and Clayton Acts, or activities which could ripen into conspiracy, monopolization or attempted monopolization if full blown. *See FTC* v. *Motion Picture Adv. Service Co.,* 344 U.S. 392, 394–95 (1953).

Section 5 has also been construed to extend to cases where the "spirit" of the Sherman Act is violated even though the activity is not illegal at common law, or condemned by the Sherman Act specifically. *See, e.g., FTC* v. *Texaco, Inc.,* 393 U.S. 223, 225–26 (1968); *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357, 369 (1965); *Grand Union Co.* v. *FTC,* 300 F.2d 92, 98–99 (2nd Cir. 1962).

Finally, the Supreme Court in *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244–45 n. 5 (1972), held that the Commission has authority under Section 5 to "consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."

Because neither conspiracy, monopolization nor attempted monopolization has been alleged in this complaint, this is not a case where Section 5 is the appropriate legal standard because of a violation of the letter of the Sherman Act. Application of Section 5 to the marketing activities of the respondents is likewise not justified on the basis of an incipient violation because there is no threat that these practices will mature into a conspiracy or monopoly. As one commentator has observed: "the concern of the government is not that the alleged unfair competitive methods, if left unchecked, may one day blossom into a full-fledged restraint; the concern is that the rose is already in bloom." Robinson, *Recent Antitrust Developments - 1979,* 80 Col. L. Rev. 1, 36 (1980)

If justification for the application of Section 5 is to be found, it must be that the activities violate the spirit of the Sherman Act, in particular Section 1's prohibition against conspiracies, contracts or combinations in restraint of trade. Complaint counsel argues analogy to Section 1 cases on the basis that the conduct herein alleged is akin to horizontal price **[130]** fixing. Respondents argue that the failure to allege or prove collusion or agreement is thus fatal to this case. Respondents' argument must be rejected.

The spirit of Section 1 has been noted as a "dread of enhancement of prices." *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 58 (1911). Thus, if the spirit of the Sherman Act is to prevent activities in the marketplace which unreasonably restrict or foreclose competition, that spirit may be violated whether such effect on competition results from concerted or individual behavior. *See Atlantic Refining Co.* v. *FTC,* 381 U.S. at 369–70; *see also* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act,* 21 Bos. Coll. L. Rev. 227, 253 (1980).

In *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 435 (1978), the Supreme Court found that an effect on price alone will not support a criminal conviction under the Sherman Act. This analysis, however, focused solely on the elements of a criminal offense under the antitrust laws and the necessary role of intent. It ". . . leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 436 n. 13.

Moreover, Section 5 is not limited by the constraints of the Sherman Act. In *Cement Institute,* respondents were charged with acting in concert to restrain competition through the use of a basing point delivered pricing system which resulted in the quotation of identical prices. Although liability was based on a finding of concerted action, the court also pointed out that this "does not mean that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Federal Trade Commission Act. *See Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 455." 333 U.S. at 721 n. 19.

The court in *Triangle Conduit & Cable Co.* v. *FTC,* 168 F.2d 175 (7th Cir. 1948), *aff'd by equally divided court sub nom. Clayton Mark & Co.* v. *FTC,* 336 U.S. 956 (1949), reached the same conclusion. Although collusion had previously been established, the court found, in an alternate holding, that the individual use of a basing point method of pricing could constitute an unfair method of competition in the sale of rigid steel conduit. The use of the basing point formula enabled sellers to quote identical delivered prices "down to the fourth decimal

point." *Id.* at 180. As a result, purchasers were deprived of a choice among sellers based on price, and competition was restricted.

It is important to note that business practices, otherwise legal, do not constitute an antitrust violation [131] because they are done jointly. Courts have refused to uphold challenges to parallel market activity by competitors where such activity is the result of independent business decision-making. *See, e.g., Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537 (1954); *Morton Salt Co.* v. *United States,* 235 F.2d 573 (10th Cir. 1956); *FTC* v. *Lukens Steel Co.,* 454 F. Supp. 1182 (D.D.C. 1978). *But see Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

More recently, the Ninth Circuit has considered the requirements necessary for a finding of Section 5 liability. In *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980), five manufacturers of plywood were charged with violating Section 5 by adopting and maintaining a system of delivered pricing which, *inter alia,* had the effect of stabilizing market prices. Although there was no alleged Sherman Act violation on which to premise a Section 5 violation, the Commission had found that each respondent individually violated Section 5 because it had adopted the same artificial system of delivered pricing. Addressing the legal status of the industrywide use of an artificial freight factor in setting prices, the court found no evidence of collusion. In the absence of collusion, the court held, there must be a demonstration that the challenged activity has had an actual effect on competition. "Without such effect, a mere showing of parallel action will not establish a Section 5 violation." *Id.* at 577. The court refused to enforce the order, since it concluded there was no substantial evidence of effect in the record.

Finding a violation of the Sherman or Clayton Acts, or Section 5 of the FTC Act, based on the *effect* of the challenged activity on competition is not a novel theory; it is the fountainhead of antitrust law. *Per se* violations of the antitrust laws ". . . are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958). Practices not presumed to be unreasonable have been tested under the "rule of reason" as the standard of analysis ever since the Supreme Court's decision in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). Under the rule of reason, the factfinder weighs all of the circumstances of a case in deciding whether a practice should be prohibited as imposing an unreasonable restraint on competition. As the Commission stated recently in *American Medical Assoc.,* 94 F.T.C. 701, 1003–04, *enforced,*

638 F.2d 443 (2nd Cir. 1980) *cert. granted,* 49 U.S.L.W. 3946 (June 23, 1981):

The test of legality is "whether the restraint imposed is such as merely [132] regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *Professional Engineers, supra,* 435 U.S. at 691. To assess the legality of the restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including any possible procompetitive impact.

The court in *Boise Cascade* did not hold that the Commission's complaint failed to state a cause of action; it held that there was ". . . not substantial evidence in the record to support the Commission's finding of competitive effect . . ." *Boise Cascade Corp.,* 637 F.2d at 582. Contrary to respondents contentions, the *Boise Cascade* decision supports the authority of the Commission to declare practices which have a substantial anticompetitive effect unlawful under Section 5.[3]

The courts have made clear that Congress fully intended the Commission to use Section 5 to supplement and bolster the antitrust laws by addressing competitive problems in areas or under circumstances in which the Sherman and Clayton Acts might not fully implement congressional antitrust policy objectives. The Supreme Court has set forth the broad congressional delegation of power to the Commission:

Section 5 of the Federal Trade Commission Act declares "[u]nfair methods of competition in commerce, and unfair *** acts or practices in commerce *** unlawful." In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce ***." S. Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition [133] could best be prevented "through the action of an administrative body of practical men *** who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19. In thus diving that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight. *See Federal Trade Comm'n* v. *Cement Institute,* 333 U.S. 683, 693 (1948). Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision "has 'warrant in the record' and a reasonable basis in law." *Labor Board* v. *Hearst [368] Publications, Inc.,* 322 U.S. 111, 131 (1944). While the final word is left to the courts, necessarily "we give great weight to the Commission's conclusion ***." *Federal Trade Comm'n* v. *Cement Institute, supra,* at 720.

[3] "We thus hold that in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices." *Boise Cascade Corp.,* 637 F.2d at 577.

Atlantic Refining Co. v. *FTC,* 381 U.S. at 367–68

The flexibility of Section 5 and the authority of the Commission to define the term "unfair" in relation to the changing nature of business has also been explicitly recognized by the Supreme Court:

> The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

FTC v. *Motion Picture Adv. Service Co.,* 344 U.S. at 396

Under the broad congressional mandate, the Commission has declared as "unfair", business practices that were not unfair in and of themselves, but unfair only because of their effect on competition. For example, consignment sales arrangements with gasoline dealers were declared unfair, and thus prohibited, in *Atlantic Refining Co.* v. *FTC,* 344 F.2d 599 (6th Cir. 1965), *cert. denied,* 382 U.S. 939 (1965). In another proceeding against this same respondent, the Commission found unfair a "sales-commission plan" of selling tires. *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357 (1965). In a very recent case, the Commission held unfair the refusal by a monopolist to **[134]** list certain connecting flight information, and to group the listings of all carriers together, in an official airline guide. *Reuben H. Donnelly Corp.,* 95 F.T.C. 1 (1980). The Commission's decision was overturned on appeal, but on the grounds that the monopolist had no purpose to restrain competition in the field of business in which it was engaged, or to enhance or expand its monopoly. There was no indication whatsoever that the Commission's complaint failed to state a cause of action. *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920 (2d Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (February 23, 1981).

Further, no case has been cited by the parties hereto where the Commission or the courts have held that the Commission has no authority to declare a business practice unlawful because the practice is a customary business practice that is not by its nature or purpose restrictive, or has not been challenged previously under the antitrust laws. The cases all turn on effect on competition.

In accordance with the authorities cited above, it is concluded that the complaint states a cause of action for which relief can be granted.

D. *Competitive Performance of the Industry*

Structure of an industry is relevant in determining whether an activity is unfair. *See FTC* v. *Texaco, Inc.,* 393 U.S. 223, 226 (1968); *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 441 n. 16; (1978) *Wall Product Co.* v. *National Gypsum Co.,* 326 F. Supp. 295 (N.D. Ca. 1971); *United States* v. *FMC Corp.,* 306 F. Supp. 1106, 1139

(E.D. Pa. 1969). Structure alone, however, has not to date supported a finding of liability. Section 5's "unfair methods" connotes behavior rather than the mere possession of power. 2 Areeda & Turner, Section 306, at 20. Another commentator has further elaborated that the Commission "must show harm from a particular practice, and cannot assume that every activity of a firm in a concentrated industry is unfair." (footnote omitted) Kruse, *Deconcentration and the FTC Act,* 46 Geo. Wash. L. Rev. 200, 223 (1978) Economic witnesses in this proceeding acknowledged that structure and conduct interact to produce performance. (Hay, 3989–91; Mann, 5486; Markham, 6851–52; Glassman, 6022; Carlton, 7976–77)

Under the guidance of these standards and with heed to the warning that "the difficulties in understanding the relationships between structure and conduct in oligopolistic markets are immense" (Sullivan, *Antitrust,* ¶ 117, at 337), a determination of the effect of the respondents' use of the challenged practices on the performance of the lead antiknock compound market will be made. **[135]**

The facts relating to the use of the challenged practices by the respondents are not controverted. All respondents use 30-day advance notice of price increases; until mid-1977, all respondents issued press notices of price changes; all respondents utilize *delivered* pricing, and *uniform* delivered pricing with respect to all list price transactions. Respondents Ethyl and DuPont utilize most favored nation clauses in their contracts with customers (these respondents did not have contracts with all customers); and Nalco had most favored nation clauses in all its contracts until 1978, and with a few contracts thereafter (this respondent also did not have contracts with all its customers). Use of the practices having been established, it remains to determine the effect of the practices on competition.

The theory of the complaint is that the challenged practices communicate information to competitors, the information thus communicated reduces uncertainty in the marketplace, and the reduced uncertainty facilitates pricing stability, thereby impeding price competition. As Michael Glassman, an expert economist who testified for Respondent PPG, stated, this necessitates a finding that the industry is not competitive, and that the practices contributed to the noncompetitive result. (Glassman, 6197) Thus, the threshold question—is the industry performing competitively? If it is not performing competitively, what impact did the facilitating practices have on that performance.[4] **[136]**

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[4] Dr. Dennis Carlton, Nalco's economic expert, testified:

> You really have to—it is just the first step, once you establish that price is in excess of marginal cost. You have to go on and analyze the features of the industry, structural features, as well as the practices, in detail to see how far that interacts in the industry and how that affects price setting behavior. (Carlton, 7977)

(footnote cont'd)

Respondents' economic experts were unanimous in their opinion that the structure of the industry was the determining factor on the competitive performance of the industry; and that the industry was performing as competitively as would be expected based on the structure. Dr. Hay, complaint counsel's expert, testified that the structural characteristics in conjunction with the challenged practices had reduced the vigor of competition, and that in the absence of the practices, competition would have been more vigorous.

The lead antiknock compound market meets the oligopoly definition advanced by economists: there are four sellers which account for the total domestic sales of the product. The relevant structural characteristics of this market include: a concentrated market with two large firms having dominant market shares and two smaller firms with less significant market shares; a homogenous product; high barriers to entry; declining and inelastic demand; and similarity of production and distribution systems. These structural characteristics are generally not in dispute. (F. 12, 32–34, 42–44, 46, 143, 205, 221, 234)

Other factors are important in analyzing the effects of the challenged practices on industry performance. Complaint counsel argues that price in the lead antiknock compound industry was greater than marginal cost. All economists testifying in this proceeding agreed that this was the case. (F. 144) There was disagreement, however, over what this means. Economists generally recognize that price is equal to marginal cost only in perfectly competitive markets. (Scheffman, 7802–03; Mann, 5420–21; Markham, 6829, 6855–56, 6904; Carlton, 7971) Therefore, this goal is never reached in an oligopoly.

Respondents had above normal profits. It can be concluded that profits during the period 1974 through at least 1977 were at supracompetitive levels and were increasing during that period. (F. 160–168) Excess capacity was available during that period had respondents chosen to utilize it. (F. 38–41) The industry was referred to by one respondent as a "golden goose". (CX 212Q) While profits declined from the high levels reached in 1977, profits remained high, and well-above economic benchmarks, for the entire period 1974–1979 until after the complaint herein issued.

In its decision in *Boise Cascade,* 91 F.T.C. at 109, the Commission noted the uncertainties associated with the use of profit data, stating that "it is obvious that supra-normal profitability can readily result from factors other than anticompetitive conduct." However, to the

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Dr. George Hay, complaint counsel's economic expert, also testified:

> . . . I think structure and conduct interact. Let me put it another way. Were there 100 firms in the antiknock industry, I doubt very seriously that the facilitating practices would have had any competitive impact. So absent a structure which is generally conducive to the effectiveness of facilitating practices, absent an oligopoly structure, you don't even get to first base. (Hay, 3990–91)

extent that profits are high in an oligopoly, prices also must be at a noncompetitive level and there is an incentive to maintain [137] profits and prices through increased interdependence.[5] This is especially true where the market is unstable, and there was instability and uncertainty associated with pricing moves in the lead antiknock compound industry. (F. 169–170)

High profits, while not demonstrating the effects of the challenged practices (Complaint counsel's answers to interrogatories—RNX 1595Z–18), are relevant to show: (1) competition in the market was less than vigorous—certainly above marginal costs, and (2) the identity of list prices in the industry was not the result of intense competition. It is concluded that profits were high in the antiknock industry, and that prices were at noncompetitive levels.[6] [138]

Respondents argue that there was substantial competition in the industry by virtue of direct discounts off list price, credit terms, tolling arrangements, forward ordering or advance buy, and the furnishing of services. Their economic witnesses were of the opinion that these practices were evidence of vigorous competition (*see, e.g.,* Glassman, 6064–69). It is clear from the record that there was some competition between respondents. Approximately 15 to 20 percent of industry sales during the period 1974–1979 were at a discount off list price. These discounts were confined primarily to two respondents and to select customers.[7] These discounts were related to list prices in such a way that transaction prices moved in direct relation to changes in list prices. The discounts and the amount of the discounts were generally known to and accepted by the respondents, since there was little or no effort to meet the discounts, at least prior to mid-1978. Further, the discounts were kept secret from other customers thus preventing pricing deterioration. One significant feature of these discounts was their controlled environment and their lack of effect on the stability of prices and market equilibrium. Two respondents were

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[5] The difficulty of maintaining high prices in an oligopoly was expressed by one economic witness as follows:

> Either you are going to collude and you are going to get to the joint maximization level or if you don't collude, your interests will be divergent and there will be a natural irresistable tendency for price to collapse toward cost. (Glassman, 6221)

The court in *Boise Cascade* stated:

> Where market forces are not artificially harnessed by an elaborate pricing formula, the normal assumption is that prices will tend to be driven to competitive levels. 637 F.2d at 579.

[6] Other factors support the conclusion that competition was less than vigorous (*see* Markham 6924; Carlton, 7976–77): *i.e.,* export prices were below domestic prices; the high cost producer was the most active price competitor (*see* Mann, 5630–31); the two market leaders with over 70 percent of the market sales, were able to avoid any price discounting; co-producer sales were at a substantial discount; respondents' fear that competition would erode prices; a refusal by respondents to quote F.O.B. prices, or prices without services; no pattern of geographical pricing although production facilities and substantial users nearby production facilities would call for such pricing in a competitive market; and failure of respondents to respond to competitive bids and other situations where large volumes over extended periods were available that would have produced substantial incremental profits (*see, e.g.,* CX 629A-B, 1709B and F. 152–156).

[7] [***]

able to retain approximately 70 percent of the market without discounting.

The Supreme Court has noted that "[t]he continuation of some price competition is not fatal to the Government's case." *United States* v. *Container Corp.,* 393 U.S. 333, 337 (1969). In *Plymouth Dealers' Ass'n* v. *United States,* 279 F.2d 128 (9th Cir. 1960), an agreement in violation of Sherman Act Section 1 was found even though the illegal activity concerned the fixing of list prices and transaction prices were discounted below list price. The Court of Appeals observed:

> The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. . . . The fact that there existed competition of other kinds between the various Plymouth dealers, or that they cut prices in bidding against each other, is irrelevant.

Id. at 132. It was important only that, as the Court of Appeals held, list prices had been tampered with—"[i]t was an agreed starting point . . . and had its effect upon . . . price." (*Id.*) (Emphasis deleted) Similarly, during the turbine generator [139] electrical equipment price-fixing conspiracy, each sale was at a discount off book or list price. *Ohio Valley Elec. Corp.* v. *General Electric Co.,* 244 F. Supp. 914, 935–36 (S.D.N.Y. 1965). Thus, the existence of discounts off list price in the antiknock industry is evidence of some competition, not conclusive that competition was vigorous.

Advance buying by refiners at the time of a price increase is also stressed by respondents as evidence of vigorous price competition and uncertainty in the marketplace. Refiners, having received at least 30-days advance notice of a price increase, were desirous of purchasing additional amounts of antiknock compound prior to the price increase. Respondents were interested in limiting the amount of these purchases because each such purchase delayed the realization of the higher price which was to be effective. The amount of such purchases was also limited by available production inventory, production capacity, available tank cars, storage capacity at the refineries, the amount of money refiners desired to tie up in product, etc. The amount of discounted product actually sold and delivered would be that amount sold at the old price which exceeded a normal 30-day ordering pattern, and which was invoiced subsequent to the effective date of the increased price. This would require a major accounting project to determine with any degree of accuracy, the amount of product sold at a discount, and it cannot be accomplished on this record.

There was some discounting and some degree of rivalry between respondents with respect to advance buying. However, the amount of these sales at a discount were controlled and limited by respondents, occurred only periodically, created customer goodwill and an atmos-

phere of competition, possibly made the approaching price increase more palatable, and did not upset the market price structure.

The furnishing of services also represented an area of rivalry between respondents. Services were furnished without charge and included product-related services, safety services, refinery efficiency services, and product equipment and inspection services. Respondents also paid outside consultants to provide services to refiners. One respondent paid substantial royalties for some refiners who used a patented process sponsored by the respondent. Another respondent provided oil import tickets having a cash value at no charge to refiners. Other services provided by respondents included installing lead weigh tanks for refiners, paying architectural fees incurred by a refiner in building an employee cafeteria, building a railroad spur to facilitate antiknock compound delivery, and providing knock engines to refiners. (F. 90–103) Some of these services were the equivalent of a cash discount; others were not (*see* Hay, 4135, 4137–39, 4144–49, 4156–69). **[140]**

The record is clear that refiners valued the services furnished by respondents, and much antiknock business volume was awarded based on services. The small refiners utilized and valued services more than the large refiners. Not being able to obtain a competitive price, it is logical for refiners to turn to other avenues of competition. The Manager of Purchasing of Sun Oil testified in this proceeding that having failed to get price competition, he decided to maximize services. (McCormick, 2644) There are numerous instances in the record where refiners requested prices without services, or prices with services quoted separately. (F. 152–156) Respondents refused to quote on this basis. There are also instances in the record where refiners who received discounts did not receive any services. (J. M. Robinson, 1176–78)

Dr. Jesse W. Markham, the economic expert witness for Ethyl, called services a near discount, or quasi-discount. He stated that services were not surprising in the antiknock industry; that services were characterized by a high degree of uncertainty, which made transaction prices in the industry different. (Markham, 6795–99, 6886–87) George Tunis, Du Pont's Director of Marketing, testified that the use of services enabled Du Pont to avoid a "commodity-type" operation and gain the profitability desired by Du Pont. It was more profitable for Du Pont to furnish services with sales of antiknock compound than to sell antiknock compound without services. (Tunis, 71, 77–78)

Dr. George Hay, complaint counsel's economic expert witness, testified that the furnishing of services was not inconsistent with diminished competition; that one often expects to find services competition where price competition has been eliminated. In a truly competitive

environment, he would not expect to see product-unrelated services provided by suppliers. Dr. Hay gave as examples of where price competition has been eliminated but competition is based on services, a situation where restaurants in a city fix the price of dinners at $25, but perhaps compete on the basis of bigger portions. He also pointed out the airlines where rates are fixed, but airlines compete on the basis of more flights, or dry martinis, or Frank Sinatra, Jr., playing the piano in the lounge of the Boeing 747. (Hay, 4374). He found it unusual for a supplier to pay an architectural fee for a refiner's cafeteria.

The use of services, while of value to refiners and valued by refiners, was distinct from price competition. The use of services did not upset the market price structure. As DuPont's Director of Marketing testified, services represented the competitive method best calculated to enable Du Pont to reach its profit objective. Dr. Hay recognized that respondents utilized service competition to prevent the price structure from deteriorating. (Hay, 4158, 4162–63) The record is silent as to specific instances where a respondent offered lower prices specifically to meet service competition. Thus, the [141] competition represented by respondents' use of services had a mixed result; it enabled respondents to engage in one type of competition while suppressing competition in another area. As the court observed in *In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127, 1137 (1976):

> There is no requirement under §1 of the Sherman Act that all avenues of competition be eliminated, or that the price fixing effectuate its purpose.

It is concluded that the furnishing of services represented competition between and among respondents, but that these activities had little or no effect on the vigor of price competition.

Respondents' arguments respecting the competition which existed in credit terms does not warrant weighty consideration.[8] Emphasis on the few instances of extended credit terms in the record only serves to point up the lack of overall competition in price. It is price competition that is the "central nervous system of our economy," *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 226 n. 59 (1940). "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." *United States* v. *Container Corp.* 393 U.S. at 338. In *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 693–96 (1978), the Court, after a com-

[8] Some of the refiners granted extended credit terms were in serious financial straits, and respondents were lending a helping hand, not competing. One instance of extended payment terms involved all respondents participating on a pro rata basis, not competing on price. Another instance of extended credit terms only made allowance for the delay in shipping product to another respondent for reacting by the latter respondent before shipping to the customer. (F. 88–89)

prehensive review of the rule of reason, concluded that nonprice competition among architects, for example on the basis of background and reputation, was irrelevant when competition on price was affected by a ban on competitive bidding.

The record reveals instances where refiners vociferously complained about the lack of competition in the lead antiknock compound industry. The Manager of Chemical Purchases of Sun Oil wrote: "[t]here has never been any price competition in the lead alkyl market." (CX 1585B) He also testified in this proceeding: ". . . [Sun Oil] perhaps would have saved more money in the end if there had been price competition [142] of the type that exists in other chemical purchasing areas." (McCormick, 2646–47) Texaco's Manager of Purchasing pressed for a volume-related price any time he saw a sales representative of an antiknock compound supplier. (Wilson, 3204) A conversation between an Ethyl salesman and a buyer is described in a 1975 internal Ethyl memorandum:

> [The buyer] rejected completely my arguments as regards our demonstrations in the past year of price leadership. He stated on several occasions during the discussion that (I am again quoting) "There is and never has been price competition in antiknocks. This business of either you or duPont raising the price; the other coming up with a different price which the first company then meets is all a smoke screen. I think its the biggest wonder in the world that both of you haven't been in trouble with the FTC before now."

(CX 577B)

Purchasing officials of the larger refiners were constantly seeking to inject competition in the industry. Thus, the record evidence supports a conclusion that the lead-based antiknock compound industry was not a competitive industry; the overall level of the industry's competitive performance was poor.[9] Prices were in excess of marginal cost, returns on investment were substantially in excess of conservative benchmarks, lock-step pricing existed in the marketplace, discounting off list price was limited and controlled, the two major sellers were able to avoid discounting, profit margins were rising during a substantial period of time—1974–1977, and overall market shares were stable.

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[9] A conclusion that industry performance was poor is not surprising in view of the background of the industry. At one time Du Pont was the sole manufacturer of lead antiknock compounds, and Ethyl the sole marketer. Later, Du Pont began marketing antiknock compounds and Ethyl also became a producer. (F. 16–17) The two remaining respondents, PPG and Nalco, were encouraged and assisted in entering the market by large refiners, probably because of a lack of competition in the industry. (F. 50) The industry's genesis was certainly not conducive to vigorous competition. (*See* Glassman, 6018)

E. *Effects of the Challenged Practices*

(1) Advance Notice of Price Increases

[143] All respondents gave notice to their customers of price increases at least thirty days in advance of the effective date of the increase. The contracts between respondents and their customers provided for this advance notice. Complaint counsel contends that the effect of advance notice was to increase certainty about rivals' actions and reduce respondents' risk in initiating price increases, thereby facilitating greater price uniformity and higher industry price levels.

Advance notice of price increases gives rivals an opportunity to respond in a way that reduces uncertainty about the industry price levels before the initiator's new price goes into effect. Advance announcements have made it possible for list price changes to go into effect at the same time and by the same amount. It also has provided the initiator of a price increase an opportunity to determine its competitors' reactions before the higher price goes into effect, thereby permitting modification or roll-back of the anticipated increase prior to its effective date. Insuring that the initiator will not be alone in the market with a higher effective price prevents a possible shift of short-term business to lower-priced competitors and, as a result, reduces risk associated with the price increase move. This increased certainty permitting all respondents to match prices also minimizes the risk of loss of customer goodwill associated with initiating a price increase, or having a price in the market which is higher than rivals' prices.

The antiknock compound market was potentially unstable. A Du Pont Executive testified that there was a "fear that it [the price structure] would tumble" and it "certainly had a potential for declining." (Tunis, 112) Ethyl similarly was concerned about "maintaining a stable market for antiknocks." (CX 207D) There was considerable uncertainty about whether a price increase, once initiated, could be maintained, and in any event whether there would be customer retaliation. As Du Pont's Director of Marketing observed about his company's attempts to raise list prices, "the major tension is being number one [the leader]," and the period after initiation of a price increase was "[e]xciting" and "very, very nerve-wracking, tense." (McNally, 2174, 2170, 2129) Competition's response to price increases was very important since "the second person in the market is the one who sets the price." (Tunis, 155–56) Advance notice of price increases eliminates uncertainties, tensions and risks in connection with price increases and tends to facilitate pricing stability.

The role of advance announcement in the marketplace was well-recognized by respondents' marketing executives. The price leaders in the industry were Ethyl and Du Pont. Du Pont scheduled announce-

ments of price increases to provide "an interval which gave our competitors a chance to respond, without [144] having to change the effective date". (McNally, 2129) Ethyl followed a similar procedure. As contemporaneously stated in connection with one of its planned price increases:

> This timing gives 37 days notice and allows one week for competition to respond, including a weekend. (CX 93A)

And if "competition" did not "respond," Ethyl would then have to follow contingency plans such as "to roll back our prices." (CX 1953Z298)

PPG executives acknowledged that the timing and amount of its price changes were determined by the actions of Ethyl and Du Pont, and PPG was aware of the significance of sending out a reply to their price increase announcements. (J. M. Robinson, 1033; Fremd, 1592–93; CX 1285, 1286; F. 182)

The record shows that during the period 1974 through May 1979 there were twenty-four price increases. In twenty instances respondents had an identical list price that was effective on the same date. In the other four instances there was an identical list price and an effective date difference of only a day or two. (F. 53–57) The success of advance notice in communicating information of price increases and facilitating the establishment of price identity thus cannot be denied. Respondents not only gave the thirty-day notice of price increases which was provided for in their contracts with customers, but knowing that each respondent had similar price notification clauses in contracts, they purposely gave an additional several days notice in order that competition would have time to respond and comply with each price notification requirement, thus insuring price identity and stability. Respondents' advance price notification practices clearly communicated information facilitating list price identity and price stability.[10]

List prices may have been identical in the oligopolistic lead antiknock compound market absent advance price notice because the product is homogenous. However, this is something that is not known and would involve sheer speculation as to what *might* have happened. Even if list prices had been identical absent advance notice, it is not known at what level prices would have been established, or what disruptive influences might have arisen at the time of price [145] moves without the practice of advance notice.[11] What this record

[10] Where information about price changes was limited, as with price increases on respondents' special mixes, there was substantial difficulty in matching list prices. (F. 172)

[11] Instead of cheating on price increases by the "advance buy" practices which occurred, respondents may have *delayed* matching price increases causing unknown and highly risky complications, and a lower level of prices.

clearly establishes is that advance notice facilitated price matching, and that price matching affected the vigor of competition.

Ethyl undercut Du Pont's price increase notices on two occasions. This first occurred in August, 1977, and may have been brought about because Ethyl was unable to meet Du Pont's effective date of the price increase within Ethyl's 30-day notification period. Ethyl announced a lower price and a different effective date. Du Pont lowered its price increase and changed its effective date to match the Ethyl price increase and effective date. In December 1977, Ethyl again undercut Du Pont's announced price increase. Ethyl gained additional volume as a result of this pricing action, although list prices of all respondents were identical, because refiners rewarded Ethyl for its pricing constraint. Had Ethyl not followed Du Pont's price increase with a 30-day notice of its own increase, Du Pont could have had a higher price out in the market for several days, and its loss of business could have been much greater and the market stability could have been endangered. This would have made Du Pont much more timid about price increases in the future. These two examples of list price competition demonstrate the effectiveness of advance notice in preventing price competition from enveloping the lead-based antiknock compound market. (*See* F. 56, 145.)

During mid-1978, Du Pont and Ethyl announced decreases in the price of TML, lowering TML below the price of TEL for the first time. (F. 52) This price competition was apparently directed at disciplining Nalco whose principal product was TML. (F. 52, 146) One significance of the above list price actions by respondents is to demonstrate the potential instability of the industry, and they in no way disprove the conclusion that the market was noncompetitive during the 1974–1979 period.

While the courts have recognized that advance price announcements are lawful in some circumstances (*see Catalano, Inc.* v. *Target Sales Co.*, 446 U.S. 643, 647 (1980) (per curiam)), there also has been recognition of the **[146]** anticompetitive potential of such practices. *See, e.g., Maple Flooring Manufacturing Association* v. *United States,* 268 U.S. 563, 582 (1925); *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 598, 598–99 (1936). In *United States* v. *Container Corp.,* 393 U.S. 333 (1969), where there was an exchange of current price information to specific customers, the court inferred an agreement to stabilize prices—"The exchange of price data tends toward price uniformity." The court also stated:

> The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition. 393 U.S. at 337.

PPG's Vice President and General Manager of the lead antiknock antiknock compound operation testified as follows:

Judge Barnes: . . . But I would like to ask, on this price stability, stability of the market, Mr. Robinson, in your belief did the publishing of identical list prices contribute to market stability?

I believe so, your Honor. (J. M. Robinson, 1002)

The inferences are irresistible that advance notice of price increases reduced uncertainty about rivals' actions and reactions to price moves and had an anticompetitive effect in stabilizing prices thereby chilling the vigor of price competition.[12]

(2) Press Notices

Until about mid-1977, all respondents issued press notices concerning price increases. While the record establishes that respondents were astute at gathering much information about list price changes from customers, and customers voluntarily, and sometimes promptly, provided list price change information to respondents, the record is also clear that respondents utilized press articles to learn about or confirm information about price changes. (F. 131–137, 175–182) While buyers were an important link in the information network [147] in this industry, there is evidence that these notifications by customers were sometimes inaccurate or unreliable. (F. 179) The fact that information may be unreliable creates further uncertainty as to rivals' pricing actions. Press releases helped ease this uncertainty by providing confirmation of price moves. PPG's expert, Michael Glassman, testified as to the effect of press announcements:

I think in general if you were to say the following thing, I would agree. That if you read it in the newspaper, and especially a trade publication, it will improve your confidence somewhat that is actually what is happening in the world.

It's another source of information and like any other source of information, the more you know about a subject, the more confident you are about your conclusions. (Glassman, 6560)

While press releases may have valid purposes, such as providing company name recognition to potential purchasers, they also provided price verification and eased the risk associated with a price move. As a result, they contributed to market stability and prevented erosion of the price structure.

Extensive evidence from respondents own records demonstrates that respondents relied on press articles to gain information, or verify

[12] "Uncertainty about rivals' behavior may force each oligopolist to act more like a perfect competitor." P. Areeda, Antitrust Analysis 231 (1974).

information about price increases. Particularly significant is the record evidence of the price increase announced on March 1, 1977 by both Ethyl and Du Pont, in differing amounts and different effective dates. The price increases were, at least in part, in response to increases in the price of lead used in making lead antiknock compounds. Du Pont's price increase was 2.0 cents per pound effective April 7, 1977, and Ethyl's price increase was .8 cents per pound effective April 4, 1977. Press accounts of these price increases also carried information that Ethyl had "no immediate plans for further adjustment" of its prices. (CX 121, 831) Du Pont's officials, having read this press story, rolled back its price to match Ethyl's price increase, and shortly thereafter all respondents announced similar price increases to match Ethyl's price increase and Du Pont's effective date. Press information played a significant role in reducing uncertainty and facilitating price matching (*see* F. 175).

The price increase of November 16, 1976, by Ethyl was authorized by Ethyl at 12:25 p.m. October 11, 1976, and was released to the press at 12:30 p.m. Du Pont received information of this Ethyl price increase from telephone calls from the press that very same day, and the information was confirmed by press reports one day later on October 12, 1976. (F. 176) [148]

PPG followed incorrect information about one price increase which appeared in the press. (F. 179) On January 21, 1977, Ethyl announced to customers and the press an increase of 0.8 cents per pound, effective February 24, 1977. (CX 8, 34) PPG learned of Ethyl's pricing action, and on January 24 announced to customers and the press that it would also be increasing its price by 0.8 cents per pound, effective February 24, 1977. (CX 1128, 1660E) Du Pont, also on January 24, advised its customers and issued a press release that it would increase prices by the same amount and be effective the same day as the Ethyl increase. (CX 786, 952A, 1109) Although Du Pont's customers were correctly informed of the February 24 effective date, *The Wall Street Journal* of January 25 incorrectly reported that Du Pont's effective date would be March 1, rather than February 24. (CX 149) PPG then moved to meet the later date of March 1. (CX 1185) Since the inaccurate information about the March 1st date was available only from the trade press, and DuPont's customers had all been informed of the correct date, it can be inferred that PPG either ignored or else did not receive information from customers and relied on information it had received from the media.

List prices continued to be identical after respondents stopped issuing press releases. The record does not permit a determination as to the speed or the certainty with which respondents learned of price increases after the practice of issuing press releases ceased in mid-

1977. There are indications that PPG had difficulty meeting the 30-day notification period in a September 1978 price increase (F. 182), and when PPG, in an unusual (and significant for PPG) price move, reduced TEL prices in July 1978, it issued a press release.[13] (F. 114) Dr. Dennis Carlton, Nalco's economic expert witness, testified about the significance of rivals obtaining accurate information about price decreases:

> [Y]ou want to make sure . . . that your rival who has very similar interests to you does not misinterpret your price decrease as a secret price cut or as price competition breaking out. It is . . . important that prices be the same and your rival know what you are doing when prices decrease. **[149]**
>
> . . . [I]t is well recognized that what creates confusion in an oligopoly is any time there is a price change and if a decrease is interpreted as all-out price competition breaking out or discounts breaking out, that could erode the price structure. . . .

(Carlton, 7236–37)

The record establishes unequivocally that respondents relied on press reports of pricing actions of rivals. If this information received from the press was not always the first information available to a respondent, it was obviously confirmatory. Thus, in conjunction with the advance notice practices of respondents, press notices increased certainty about rivals' pricing moves and facilitated price matching. That other sources of information were available to respondents,[14] and also utilized by respondents, does not negate the fact that respondents used press reports in their pricing moves and that the use of press reports conveyed information that facilitated price matching and price stability.

(3) Uniform Delivered Pricing

All respondents have quoted lead antiknock compound prices on a uniform delivered list price basis, and other transaction prices are also quoted on a delivered price basis. (F. 184) The respondents transact all business on a delivered price basis despite repeated and unsuccessful attempts by refiners to obtain quotations for prices F.O.B. respondents' manufacturing facilities, and despite exceptional locational advantages of some customers' refineries. This system of pricing insures that in approximately 80% or more of all sales the cost of the delivered product quoted to the purchasing refinery is the same no matter where the antiknock compound is **[150]** produced, where

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[13] PPG's rivals could have quickly learned the details of PPG's decrease from the trade press, for at least one wire service carried PPG's story on July 5 (CX 423), the date the decrease was announced.

[14] In *Container*, 393 U.S. at 335, the Supreme Court noted:

> There was to be sure an infrequency and irregularity of price exchanges between the defendants; and often the data was available from the records of the defendants or from the customers themselves.

the purchasing refinery is located, or how far or by what mode the product is transported.[15]

A delivered pricing formula removes transportation and other cost variables from the pricing structure, thus simplifying each producer's price format. An antiknock compound producer seeking to match a competitor's price under this system need not deal with complications engendered by freight tariffs or speculate on its competitors' transportation cost variables. A delivered pricing formula eliminates much of the speculation about the existence of discounts potentially hidden in varying degrees of freight absorption. Abandonment of the industry practice of delivered pricing could well have led to a general deterioration in the overall pricing of antiknock compounds. Professor Scherer has commented on the role that delivered pricing plays in facilitating and maintaining uniform prices:

> If each producer independently and unsystematically quoted prices to the thousands of destinations it might serve, it would almost surely undercut rivals on some orders, touching off retaliatory price cuts. But common adherence to basing point formulas in effect eliminates discretion and uncertainty, and if each firm plays the game and sticks to the formulas, price competition is avoided. Identical prices are quoted to a given customer by every producer, leaving the division of orders to chance or nonprice variables (such as delivery times, special service, the dryness of martinis provided by salesmen at business luncheons, etc.—bases on which oligopolists often prefer to compete).

F. Scherer, *Industrial Market Structure and Economic Policy* 329 (1980). Another commentator has noted that such systems are often adopted "primarily to eliminate a kind of uncertainty that is a potent force disrupting stable noncompetitive oligopoly pricing." Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal.* 75 Harv. L. Rev. 655, 674 (1962).

The courts have recognized for years that delivered pricing systems, or basing point systems, are methods by which competitors avoid the rigors of price competition. *See,* [151] *e.g., FTC* v. *Cement Institute,* 333 U.S. 683, 713 (1948); *Triangle Conduit & Cable Co.* v. *FTC,* 168 F.2d 175, 181 (1948), *aff'd by an equally divided court sub nom. Clayton Mark & Co.* v. *FTC,* 336 U.S. 956 (1949).[16] In *Boise Cascade,* the Ninth Circuit commented on delivered pricing systems as follows:

> When combined with the standardization of delivery methods, service extras, and discounts, any delivered pricing system can become a potent tool for assuring that competitors are able to match prices and avoid the rigors of price competition.

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[15] [***]

[16] The following cases also hold that industrywide use of the same basing point system results in the quoting of uniform prices and in price matching: *Allied Paper Mills* v. *FTC,* 168 F.2d 600 (7th Cir. 1948), *cert. denied,* 336 U.S. 918 (1949); *Fort Howard Paper Co.* v. *FTC,* 156 F.2d 899 (7th Cir. 1946), *cert. denied,* 329 U.S. 795 (1946); *National Lead Co.,* 49 F.T.C. 791 (1953), *enforced,* 352 U.S. 419 (1957); *Chain Institute,* 49 F.T.C. 1041 (1953), *enforced,* 246 F.2d 231 (8th Cir.), *cert. denied,* 355 U.S. 895 (1957).

* * * * * * *

As we have seen, anticompetitive delivered pricing systems generally have developed as a means of resisting market pressures for price cuts that might lead to feared price wars; they tend to reinforce rather than cause anticompetitive market. Where market forces are not artificially harnessed by an elaborate pricing formula, the normal assumption is that prices will tend to be driven to competitive levels.

637 F.2d at 575, 579

Respondents are not charged with a conspiracy; the charge in the complaint is that this practice of industrywide uniform delivered pricing communicated information to respondents thereby facilitating price matching and price uniformity resulting in a lessening of competition. The capacity of uniform delivered pricing for communicating pricing information between respondents is so well-recognized that further elaboration is unnecessary. Respondents each knew the others were utilizing delivered pricing. Indeed, respondents argue that customers desired, even demanded, delivered pricing (although the record is clear some customers requested F.O.B. [152] pricing). Thus, with knowledge that each knew the other was using delivered pricing, the communicative value and effect of the practice is manifest; the practice enabled respondents to match prices and avoid the rigors of competition.

(4) Most Favored Nation Clauses

A most favored nation clause in a sales contract is a promise by a seller to offer its purchaser the benefit of any lower price the seller gives another customer. Use of a most favored nation clause requires that some or all of the seller's other customers receive the same discount. Ethyl and Du Pont were the primary users of most favored nation clauses during the complaint period, although each of the other respondents did employ them in various ways. Most favored nation clauses discourage deviations from list price by making such deviations expensive and by increasing the likelihood that the deviation will be discovered and result in matching. Cutting prices to a large number of customers, or "across-the-board" to all customers, would be unlikely to generate the large increment of additional business to justify the loss in profits by cutting margin.

Most favored nation clauses not only create disincentives to discount; they also reduce uncertainty about rivals' prices and pricing actions in significant ways. Since such contractual provisions discour-

age discounting, a firm's knowledge that its rivals employ them provides assurance that the latters' discounting will be constrained. As a result of this reduction in uncertainty about rivals' transaction prices, most favored nation clauses facilitate price increases by improving confidence that information regarding a competitor's prices, gathered from only one or two sources, is applicable to all customers. Further, since most favored nation clauses discourage discounting and promote price uniformity, rivals have increased confidence that the higher announced list prices reflect higher transaction prices as well.

Knowledge of rivals' use of most favored nation clauses also enhances the anticompetive impact of delivered pricing by adding an assurance that delivered price quotations are uniform. Conversely, uniform delivered price quotations, when knowingly used in conjunction with most favored nation clauses, reduce uncertainty about whether a rival is hiding a price discount, for example, through freight absorption or other manipulation of the freight component of price.

The use of most favored nation clauses by Ethyl and Du Pont was well-known to each other. The use of such clauses by PPG and Nalco was less certain among respondents, and thus of little or no communicative value. However, the use of the [153] clauses by Ethyl and DuPont in their contracts is unquestioned and the substantial facilitating effect of the practice is clear in the record.[17]

Respondents Ethyl and Du Pont advised their customers that the most favored nation clauses assured equal treatment to all customers. The clause was used by both respondents as an ethical and legal reason for refusing to deviate from list price in quoting prices and responding to bid requests. (F. 194) While respondents attempted in this proceeding to equate the most favored nation clauses with the Robinson-Patman Acts' prohibitions on price discrimination, it is obvious from the text of the clause and the statute that the clause is far more restrictive than the Robinson-Patman Act. It also is obvious from intracompany documents that respondents relied upon the most favored nation clause, not the Robinson-Patman Act, as a device to avoid price competition.[18] [154]

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[17] Ethyl has announced to its customers that it was deleting its most favored nation clauses from its contracts effective January 1, 1981. (F. 117)

[18] Ethyl wrote to Texaco and Sun in response to bid requests seeking lower prices:

> Legally we cannot give you a special discount on 'Ethyl' antiknocks without breaching all sales agreements in force. (CX 1587A, 1713A)

Du Pont wrote to Exxon in 1978 and 1979 making similar statements. The 1979 letter stated:

> [W]e cannot prudently guarantee a fixed price. Our contractual arrangements are such that we would be required to do this on an industrywide basis, and this would force a business whose profit margins are already shrinking to an untenable position. (CX 1077)

(footnote cont'd)

Ethyl and Du Pont each recognized that the most favored nation clause restricted their own and each other's flexibility and ability to grant discounts. (F. 197) An Ethyl management document written in November 1975 reveals clearly that the clauses communicated information to Ethyl about rivals' use of the clauses:

> DuPont (like PCD [Ethyl]) has evergreen contracts with many refiners. These contracts guarantee favored-nations treatment on pricing for 'equal quantity - equal quality'. Houston Chemical and Nalco are less encumbered by contracts. (CX 394Z–5)

Ethyl's Chairman of the Board of Directors inquired in 1977 about Ethyl's marketing strategy in a possible "free-for all" ". . . if Du Pont abandoned their most favored nations provision with the next set of contracts?" (CX 222B; *see also* Day, 614–15). Ethyl expressly recognized that its use of most favored nation clauses communicated information to its rivals. In a management business review document, Ethyl noted that ". . . cancelling old contracts and eliminating the favored-nations clause would be known to competition immediately. It would signal to them a change in our sales strategy. . . ." (CX 220P–Q)

Du Pont's Director of Marketing testified that Du Pont could not eliminate most favored nation clauses from its contracts without creating "wild speculation as to why." (Tunis, 393) A Du Pont sales representative wrote his superiors that he did not believe Ethyl would respond to an Exxon bid request for an F.O.B. price ". . . for much the same reason that I believe Du Pont would not respond to this invitation." (CX 631A) He testified that Ethyl's use of the most favored nation clause was a factor in his belief about Ethyl's possible pricing action:

> It probably was, yes. (Miller, 2000)

The record reflects that refiners desired most favored nation clauses, and that some refiners routinely placed such clauses in purchase orders. (F. 121–122, 201) The record also reflects that PPG made little use of such clauses, that [155] Nalco refused to include such clauses in contracts, and that Ethyl apparently has cancelled most favored nation clauses from its contracts. Thus, the use of the most favored nation clause in contracts was not a business necessity. The record strongly supports a conclusion that its use by Du Pont or Ethyl,

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In August 1978, Du Pont's Director of Marketing wrote to a Du Pont sales representative about a pricing proposal to Mobil:

> Your trade report indicates that Mobil might have the opinion that we could legally meet a competitive price if we had confirmation of the price offered. Our 'favored nation clause (Article 7 - 'Price Protection)' in our contract prevents us from doing that unless we made the price available to the industry as a whole. It is important that our customers not be confused on this point. (CX 1079A)

with 70 percent of the market, clearly communicated information to each other, thereby facilitating price uniformity and stability.[19]

(5) Summary

PPG and Nalco made a substantial portion of their sales [***] They also injected new areas of competition into the market, such as [***] the hiring of outside consultants as a form of service competition. PPG and Nalco did not utilize most favored nation clauses to the extent that Ethyl and Du Pont did. The communicative effect of their most favored nation clauses has not been shown. However, each has given notification of price changes to the trade press and received and acted upon information about rivals' price changes from that source. Each has also generally given 30-day advance notice of price increases. Both were greatly concerned about getting their price change notices out on time, making list prices uniform. PPG and Nalco benefitted each time there was a price increase as [***] Both companies' use of delivered pricing reduced uncertainty about their list prices and facilitated list price increases and matching of prices to individual customers. Had PPG and Nalco not followed these practices, uncertainty about rivals' prices would have been greater. Ethyl and Du Pont would not have been able to maintain the market stability without the solidarity made possible by the actions of PPG and Nalco.

A conclusion that the challenged practices communicated information to respondents facilitating price stability does not deny that other sources of information aided respondents in their business decisions. Respondents used all available sources of information and were very knowledgeable about the antiknock compound market and their rivals' actions. A high degree of interdepence was practiced. The complaint charges that the challenged practices facilitated pricing objectives, not that they compelled such action, or that the practices were [156] the sole basis of respondents' actions. Further, respondents may have had, and did have, some legitimate business reasons for raising prices, or using a delivered pricing system, or including a most favored nation clause in customer contracts, or treating all customers equally on price.[20] The profitmaking goal of business is well-recognized, and profit maximization is not charged as being unlawful. Nor is there any charge in the complaint that respondents are required to compete, or that they must reduce prices, or that they must meet all

[19] Courts have recognized that most favored nation clauses can have the effect of keeping prices uniform. *See United States* v. *Eli Lilly and Co.*, [1959] Trade Cases ¶ 69,536 at 76,153 (D.N.J. 1959); *see also Connoll Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 623–24 (1975).

[20] An intracorporate business policy to treat all customers fairly—equal as to prices—must be communicated to rivals and to customers. An effective way to do this would be by use of a most favored nation clause and a uniform delivered pricing system. Obviously, the use of these practices would facilitate communication of a business policy, and offer some assurance the business policy was being followed.

customers' demands for lower prices, or that they must be forbidden from considering a rival's anticipated reaction to their pricing move.

The complaint charges that the use of the challenged practices facilitated the maintenance of substantially uniform price levels and the reduction of competition in the lead-based antiknock compound industry. There can be no question but that these practices communicated information to respondents that facilitated price matching. Contemporaneous intracorporate documents clearly demonstrate the use of the practices by respondents, and that the practices facilitated price uniformity.

As with any practice which creates a trade restraint, the remaining determination to be made is the substantiality of the effect of the practices. All business practices communicate information. The practices challenged herein were not alleged to have been adopted through conspiracy, nor with the intent to restrain competition. Further, the practices are not novel to the lead-based antiknock market, but are widely used in other industries. Thus, to be declared unlawful and prohibited, it must be shown that the practices had a substantial effect on competition. In measuring market impact, the practices may be viewed both singly and collectively. Since the practices interacted by communicating pricing information, their effect was synergistic.

The Supreme Court has stated that price competition is the "central nervous system of our economy." *United States* v. *Socony-Vacuum Co.,* 310 U.S. 150, 226 n. 59 (1940). The underlying premise is that the buying public is entitled to an **[157]** opportunity to bargain with regard to purchase price. *Chain Institute, Inc.* v. *FTC,* 246 F.2d 231, 237 (8th Cir. 1957), *cert. denied,* 355 U.S. 895 (1957); *see also National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978). Stabilizing prices as well as raising prices is a *per se* violation of the Sherman Act if accomplished through conspiracy. *United States* v. *Socony-Vacuum Co.,* 310 U.S. at 223. Conduct that *facilitates* price stability has been held to have a substantial effect on competition and thus within the ban of the Sherman Act.[21]

In this proceeding, "[T]he inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition." *United States* v. *Container Corp.,* 393 U.S. at 337. In addition to logical inferences, there is substantial evidence of actual effect on competition. Ethyl and Du Pont were able to cite to their most favored nation clause as (1) assurance that all customers were treated equally, and (2) as a legal reason for not granting discounts. Each knew the other had such clauses in their contracts and were thereby restricted in their ability

[21] In *Socony Vacuum,* a buying program for distress gasoline was the conduct which had an effect of stabilizing prices. *United States* v. *Socony Vacuum Co.,* 310 U.S. at 220.

to discount. Ethyl's highest official, the Chairman of the Board of Directors, was concerned with a possible "free-for-all" if Du Pont abandoned its most favored nation provision with the next set of contracts. (CX 222B) In a management business review document, Ethyl noted that "... cancelling old contracts and eliminating favored nations clause would be known to competition immediately. It would signal to them a change in our sales strategy . . ." (CX 220P–Q) In making announcements of price increases, Ethyl and Du Pont, the price leaders in the industry, not only gave the 30-day notice of price increases, which their contracts required, they gave several additional days notice so that competition could respond:

> This timing gives 37 days notice and allows one week for competition to respond, including a weekend. (CX 93A)

It must be concluded, therefore, that because Ethyl and Du Pont shared 70% of the sales in this market, the challenged practices facilitated the price stability in that portion of the market and enhanced prices. The practices also impacted on sales by PPG and Nalco, since their prices were tied directly to list prices. Although other avenues of interfirm rivalry [158] existed, the effect of the challenged practices on the vigor of competition was substantial.

Complaint counsel's economic expert, Dr. Hay, testified that without the facilitating practices, the "overall level of performance was likely to have been changed", there would have been "different behavior", it "would have made a difference" "[T]here would have been a noticeable change, a significant change." (Hay, 3825–26, 4372–73) The measurement of impact of the practices on price, of course, cannot be precisely made.[22] The record evidence clearly supports a conclusion that the practices facilitated the stabilization of prices in a substantial industry over a substantial period of time. This is a sufficient effect to make the practices unfair. Thus, the use of the practice by respondents violates Section 5 of the Federal Trade Commission Act as unfair methods of competition.

The possible procompetitive effects of the challenged practices are not of sufficient consequence to overcome the substantial impact which the practices have had on price. The stated desire of some refiners to purchase antiknock compounds pursuant to one or more of the challenged practices does not necessarily alter any conclusion about their adverse impact on competition or their asserted procompetitive benefits. An individual customer may rationally wish to have

[22] The Commission recognized in *Boise Cascade* that measurement of impact of a practice on price is "not susceptible of definitive proof." The Commission also stated this decisional deficiency does not mean "the inquiry cannot be attempted, and that schemes alleged to stabilize prices are immune from scrutiny." *Boise Cascade*. 91 F.T.C. at 91, n.5.

advance notice of price increases, uniform delivered pricing, or most favored nation clauses available in connection with the purchase of antiknock compounds. However, individual purchasers are often unable to perceive or to measure the overall effect of all sellers pursuing the same practices with many buyers, and do not understand or appreciate the benefit of prohibiting the practices to improve the competitive environment. For example, a buyer would always want advance notice of a price increase if prices are going to be uniformly increased and if given the option to "stock up" at the old price. Similarly, a refiner far away from the respondents' antiknock compound manufacturing plants may believe its transportation costs are being subsidized by refiners with nearby production centers, but if delivered pricing has facilitated achieving and maintaining noncompetitive levels to all purchasers, then the system has harmed all purchasers. And lastly, a most favored nation clause is perceived by individual buyers to guarantee low prices; whereas widespread use of the clauses has the opposite effect of keeping [159] prices high and uniform. In short, marketing practices that are preferred by both sellers and buyers may still have an anticompetitive effect.

The Supreme Court has expressly held that methods of competition are "unfair" and in violation of Section 5 if they are unfair to the public in reducing competition, even if all parties to the practices desire them. As the court stated in *FTC* v. *Motion Picture Adv. Service Co.,* 344 U.S. 392 (1953), in enforcing the Commission's order:

> These and other business requirements are the basis of the argument that exclusive contracts of a duration in excess of a year are necessary for the conduct of the business of the distributors. The Commission considered this argument and concluded that although the exclusive contracts were beneficial to the distributors and preferred by the theatre owners, their use should be restricted in the public interest.

Id. at 395–96. Accord *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 242–43 (1948).

There was no meaningful commercial benefit derived from respondents' announcement price changes to the trade press prior to the end of 1977. The record shows that respondents can easily communicate with their customers by telephone, Mailgram, and other means. The primary commercial benefits of advance notice are to permit buyers to switch to another, lower-cost supplier and to stock up on lower-cost product. During the 1974–79 period, there was never a significant, publicly-known difference in respondents' effective dates for price increases and, as a result, buyers did not have the opportunity to switch to a lower-cost supplier. The value of purchasing extra antiknock compounds during the notice period was limited by the cost of financing the extra inventory and by refiners' limited storage capaci-

ties. Each respondent, moreover, had express policies to limit this advance buying. The limited benefits to refiners of the advance buy cannot be said to equal or offset the benefits to be gained by vigorous competition. One refusal by a respondent to match a list price increase would more than compensate for the advance buy practices. Advance buy existed because of the lack of price competition in the industry.

There is little increased efficiency or savings from the uniform delivered price system. Under the present system, respondents have the burden and expense of auditing freight charges. Shifting this burden to the refiners is merely a reallocation of resources, not a cost savings. Neither does delivered pricing confer any real benefit on refiners with **[160]** respect to product toxicity. Numerous toxic chemicals, such as sulphuric acid, chlorine and hydrofluoric acid are safely sold on some sort of F.O.B. manufacturing-site basis. Uniform delivered pricing also carries no benefits to the buyer by insuring that the risk of loss remains with the seller until delivery of the product at the buyer's refinery, since these matters are easily negotiated.[23] Additionally, the carrier is responsible for the safe intransit delivery of the product. Under the present system, refiners close to production centers effectively subsidize refiners more distant from production centers. A more economical and efficient allocation of resources would be to sell F.O.B. manufacturing plant plus actual freight. Certainly, a more flexible pricing system would tend to increase uncertainty and thereby enhance the competitive process.

There has been no record showing of how most favored nation clauses benefit refiners, or competition generally. The clause might provide some comfort to a buyer, or to a buyer's purchasing agent, but the record is silent on any refiner that actually received a lower price because of the most favored nation clause. On the contrary, the record in this proceeding establishes beyond cavil that the most favored nation clause has been used as an excuse for not giving a refiner a lower price. As used in the lead antiknock compound industry, most favored nation clauses have been an impediment to competition.

Any procompetitive benefits of the challenged practices are clearly outweighed by their anticompetitive attributes. Accordingly, it is concluded that the use of the challenged practices constitute a violation of Section 5 of the Federal Trade Commission Act.

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[23] In the 49 states that have adopted Article 2 of the Uniform Commercial Code, the risk of loss of goods in transit passes when the buyer takes delivery at the refinery, irrespective of whether delivered pricing is used, U.C.C. Section 2–509(1)(b). In addition, the law in all states, including Louisiana, is clear that contracting parties may always negotiate when risk of loss passes. U.C.C. Section 2–509(4); La. Civ. Code Ann. arts. 2468, 2484; *C.W. Greenson Co.* v. *Harnischfeger Corp.*, 231 La. 934, 93 So.2d 221 (1957).

XII. REMEDY

The use of the challenged practices has had the effect of reducing uncertainty and promoting price uniformity in the lead-based antiknock compound market. A cease and desist order is therefore appropriate as a remedy for the violation of Section 5. **[161]**

Respondents have raised the argument that no relief at all is justified because the market has changed since the issuance of the complaint and that injunctions are to be framed according to facts in existence at the time of an order. It is true that an order may not be justified where the challenged practice has been long discontinued, (*see New Standard Publishing Co., Inc.* v. *FTC,* 194 F.2d 181, 183 (4th Cir. 1952); or where there have been structural changes in the industry which would make a remedy unnecessary (*see Columbia Broadcasting Systems, Inc.* v. *FTC,* 414 F.2d 974, 981–82 (7th Cir. 1969)).

That is not the situation here. Although demand for antiknock compounds has been declining and may continue to decline because of government-imposed regulations, this is not surprising news to the respondents. Decline in demand has been anticipated at least since the implementation of the EPA regulations relating to lead content in gasoline. Moreover, there have been no other structural changes in the market such as a change in the nature of the product, or the entrance of new competitors stimulating competition. *Cf. Id.* at 981–82.

Further, although there is some evidence of an increase in the number of discounts and services provided to refiners after this proceeding was initiated in May, 1979, and a sharp decline in profits since that date, there is no overall showing that the level of price competition has increased or is likely to increase to the point where relief is unnecessary. On the contrary, the decline in demand may create an increased need for pricing interdependence. In other words, increased interdependence is as likely a result of decreased demand as is a more competitive environment. "[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 334 (1961)[24] **[162]**

"[T]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *National Society of Professional Engineers* v. *United States,* 433 U.S. 679, 698 (1978). It is well-established

[24] PPG and Nalco contend they have been procompetitive forces in the industry since their entry into the market in the 1960's. Admittedly this is true; these two respondents have been responsible for much of the interfirm rivalry which has existed. It has been concluded, however, that interfirm rivalry was strictly limited, and that PPG's and Nalco's use of the challenged practices contributed to this overall lessening of competition. Although the effect of PPG's and Nalco's use of the practices may have had a lesser impact on the vigor of competition, they were not innocent bystanders.

that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices," and that so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist," the courts will not interfere. *Jacob Seigel Co.* v. *FTC,* 327 U.S. 608, 611, 613 (1946) *See also FTC* v. *Cement Institute,* 333 U.S. 683, 726 (1948); *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); and *L. G. Balfour Co.* v. *FTC,* 442 F.2d 1, 23 (7th Cir. 1971). Having established a violation of law, the Commission must "be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity." *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952)

The remedy entered herein is reasonably related to the practices which were found to inhibit competition. Only reasonable "fencing-in" provisions have been included, and certain order provisions sought by complaint counsel have been rejected. The remedy is in no way punitive, and leaves considerable marketing discretion in respondents' hands. Since the conduct found unlawful was not alleged to be criminal in nature, or *per se* unlawful, or to have been carried on with an intent to injury competition, the remedy should be tailored accordingly. The prohibitions and affirmative duties imposed under this Order are justified because they are needed to remedy the continuing effects of these unfair methods of competition. *See FTC* v. *Mandel Bros., Inc.,* 339 U.S. 385 (1959); *American Medical Association* v. *FTC,* 638 F.2d 443, 451 (2nd Cir. 1980); and *Grand Union Co.* v. *FTC,* 300 F.2d 92, 100 (2nd Cir. 1962).

The use of advance notice of list price changes has allowed a move to increase prices to be communicated to competitors before it is effective. As a result, list prices have gone into effect in the same amount and at the same time, and there has been no list price competition in the lead antiknock compound market. Respondents, accordingly, will not be permitted to announce to customers in advance of their effective date any list price changes. This will increase the risk associated with price moves.

Respondents argue that an order affecting advance notice interferes with their First Amendment free speech right. This argument is without merit, but because of its implications deserves discussion.

Publication of list prices is a form of speech and thus entitled to constitutional protection. However, it must be **[163]** characterized as commercial speech; that is, expression related to the economic interests of the speaker and its audience and which proposed a commercial transaction. *Virginia State Bd. of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 762 (1967). The importance of commercial speech in economic decision-making is that it "serves to inform the public of the availability, nature, and prices of products and services,

and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 364 (1977)

Commercial speech, however, is entitled to less constitutional protection than other speech forms. *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 477, 456 (1978) For example, most commercial speech has been regulated because it is either deceptive or misleading, or because it has been unduly restrictive. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. at 770–773; *Official Airline Guides, Inc.* v. *FTC,* 630 F. 2d 920 (2nd Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (1981)

More recently, the Supreme Court has further articulated the standard by which commercial speech may be regulated. Commercial speech is entitled to protection unless it is misleading, or related to an unlawful activity. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557, 566 (1980)

The publication of list prices by respondents has been neither misleading nor restrictive of the flow of information. However, it has been found to be an unfair method of competition within the meaning of Section 5 of the FTC Act because it has helped facilitate uniform prices and limit aggressive price competition in the lead-based antiknock compound market. Violation of the antitrust laws is a substantial government interest justifying regulation of speech. *Professional Engineers,* 435 U.S. at 696–98

The prohibition on advance notice of list price changes will eliminate the consequences of the unlawful conduct. Nothing in the Order will prohibit the communication of price information to actual or potential customers. The focus is on the timing of such communications. Arguably, the interest of consumers in the "free flow" of commercial speech is impeded by any restriction. *Virginia State Board of Pharmacy,* 425 U.S. at 765. However, limitations are justified if they serve a significant government interest and "that in doing so they leave open ample alternative channels for communication of information." *Id.* at 772

The content of information received by antiknock customers will in no way be altered by a prohibition on advance notice, and, indeed, may provide a customer benefit. Lead [**164**] antiknock compound customers are easily reached by telephone, mail, telegram, and personal contact. Discontinuance of advance notice will not interfere with the business routines of respondents because customer access to such information is already well-established. In addition, there has been no difficulty in permitting list price decreases to go into effect immediately upon announcement. Under this reasoning, the First Amend-

ment presents no obstacle to an order prohibiting advance notification of price changes to remedy the antitrust violation.

Advance notification is currently provided to some customers pursuant to 30-day notification clauses in their contracts with the antiknock producers. This also presents no impediment to an order requiring deletion of contractual provisions, even though no customer is a formal party to this litigation. *United States* v. *International Boxing Club of New York, Inc.,* 171 F. Supp. 841, 842 (S.D.N.Y. 1957), *aff'd.* 358 U.S. 242, 247 (1959); *L. G. Balfour Co.* v. *FTC,* 42 F.2d 1, 23 (1971); *Coca-Cola Co.,* 80 F.T.C. 1023 (1972), *vacated on other grounds and remanded,* [1980–81] Trade Cas. (CCH) ¶ 63,777 (D.C. Cir. 1981) [642 F.2d 1387]; *PepsiCo., Inc.* v. *FTC,* 472 F.2d 179, 189 (2nd Cir. 1972), *cert. denied,* 414 U.S. 876 (1973); *see also Seven-Up Co.* v. *FTC,* 478 F.2d 755 (8th Cir. 1973), *cert. denied,* 414 U.S. 1013 (1973); *Coca-Cola Co.* v. *FTC,* 475 F.2d 299, 304 (5th Cir. 1973), *cert. denied,* 414 U.S. 877 (1973)

A provision has been included in the Order which prohibits retroactive price changes. Prohibiting retroactive price changes or price modifications prevents a seller, which has put a price increase into effect, from rescinding the increase retroactively and accomplishing the same result as advance notification. This provision is warranted to assure that the prohibition on advance notice of price increases will be effective and not bypassed with impunity.

Complaint counsel has sought a ban on interproducer sales because they communicate information among respondents. There appears to be little market benefit in banning such sales, and further, it could have anticompetitive results, especially in relation to Nalco and PPG. Nalco has been PPG's second largest customer. PPG has bought TML primarily from Nalco. The advantage to PPG of the flexibility and lower cost has been an important element in its ability to compete. Moreover, PPG has not produced TML since 1977 and has no present capacity to do so. At a time of declining demand, requiring investment to modify manufacturing processes is not economically feasible nor justified by the record in this case. The reasoning applied to PPG also is applicable to Nalco. While Ethyl and Du Pont are self-sufficient in all kinds of antiknock compound production, Nalco and PPG clearly are not. Competition will be fostered by making certain that this proceeding does nothing to push any respondent out of the market. Accordingly, **[165]** there will be no ban on interproducer sales. However, communication between respondents respecting prices has been limited to what is minimally necessary to effect a purchase or sale of antiknock compound. *See Martin Marietta Corp.,* 88 F.T.C. 989, 994 (1976)

Respondents also have been prohibited for a period of thirty (30)

days from communicating with the media any information respecting a price change or price modification. Respondents argue that any remedy relating to the issuance of press releases is moot because they abandoned the practice prior to learning of this antitrust action.

All respondents discontinued the issuance of press releases at different periods during 1977. While the sole function of relief is to prevent future violations (*United States* v. *Oregon State Medical Society,* 343 U.S. 326, 333 (1952)), the fact of discontinuance alone does not make a cease and desist order invalid. *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920, 928 (2nd Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (1981)

Although respondents did discontinue press notices of price changes in 1977, there is evidence that standby statements later were used to respond to press inquiries about pricing actions. Also, PPG, in 1978, issued a press release when announcing what PPG determined to be a significant price move. Press notices could be commenced again on short notice, and standby statements could become significant if other avenues of information about prices are foreclosed. Since there is a possibility that press notices or standby statements can be used, and as a matter of "fencing-in", a prohibition against media contact has been included in the order. Constitutional objections to this provision are also rejected (*see* constitutional argument, *supra.*).

Because it simplifies the pricing formula by charging the same freight to all customers regardless of geographic location, the use of uniform delivered pricing has facilitated matching of actual transaction prices. The Order will be directly to the use of *uniform* delivered pricing systems which eliminate variables which complicate freight rates. Numerous separate delivered costs to different customers makes matching of prices more difficult.

The use of delivered pricing has not been found to be unlawful and will not be prohibited because it appears to offer certain advantages to antiknock customers. Therefore, respondents may continue to independently make the decision to absorb all or part of the freight charges in order to meet a distant competitor's price. However, any use of a delivered price must be offered as an alternative to an F.O.B. mill price plus freight. *See, e.g., Boise Cascade Corp.,* 91 F.T.C. at **[166]** 109–10; *Martin Marietta Corp.,* 88 F.T.C. 989, 993–94 (1976) (consent order)

Refiners who feel that delivered pricing offers them an advantage because the risk of loss remains on the seller will continue to have that option available. Those who feel that F.O.B. pricing provides a more reasonable means of transportation because of proximity to the production site will have that option available. What is prohibited is

systematic price matching or price equalization which charges the same delivered price to all customers not similarly situated.

Most favored nation clauses have been used by Ethyl and Du Pont as a reason not to discount from list price. These two companies engaged in virtually no discounting from list between 1974 and 1979. Their transaction prices have approximated their list prices and were readily identifiable. Du Pont and Ethyl each knew of and relied on the other's use of the clause to prevent price deterioration of antiknock compounds. As a result, the use of the clause operated to reduce uncertainty in at least 70% of the market. These two companies will therefore be prohibited from the use of these clauses or any agreement having similar effect, in the sale of lead-based antiknock compounds. PPG and Nalco have made limited use of most favored nation clauses, and the impact of their practices on the market was not demonstrated. However, these two companies may have difficulty competing if they are unable unilaterally to remove any remaining most favored nation clauses from their contracts. A prohibition requiring their removal will leave PPG and Nalco in a stronger competitive position, since Ethyl and Du Pont will no longer have such clauses in their contracts. Although Ethyl has taken steps to remove the clause from its contracts, this issue is not mooted. Unlike press releases, the discontinuance of most favored nation clauses by Ethyl was instituted only after the complaint was filed and the practice challenged as an unfair method of competition. Further, there has been no assurance that Ethyl will, or has been, successful in removing the clause, or that the use of the most favored nation clause will not be resumed.

It is believed that the Order entered hereinafter is reasonably related to the violations of law found to exist, is no more restrictive than necessary, and that it will have a noticeable impact on the vigor of competition.

XIII. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.

2. The acts, practices, and methods of competition charged in the complaint took place in or affecting commerce within the meaning of the Federal Trade Commission Act. [**167**]

3. While engaged in the sale and distribution of lead-based antiknock compounds, respondents individually engaged in the use of advance price notification, the issuance of press releases prior to 1978, most favored nation clauses in their customer contracts (except PPG), and uniform delivered pricing.

4. The use of these practices individually and collectively by respondents has had the effect of:

a. reducing uncertainty about prices of lead-based antiknock compounds;

b. creating list price uniformity in the sale of lead-based antiknock compounds;

c. facilitating uniformity of transaction prices of lead-based antiknock compounds; and

d. contributing to maintenance of substantially uniform price levels and the reduction of price competition in the lead-based antiknock compound market.

5. The acts, practices and methods of competition of respondents, individually and collectively, constitute unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended.

6. The Order entered hereinafter is appropriate and necessary to remedy the violations of law which have been found to exist.

Order

I

Definitions

For the purpose of this Order, the following definitions shall apply: **[168]**

A. *Lead-based antiknock compound* means additives to gasoline which increase its octane rating and which contain tetraethyl or tetramethyl lead.

B. *Delivered price* means a single, undivided or unitary price inclusive of product and transportation charges.

C. *Customer* means any purchaser of a lead-based antiknock compound.

D. *Most favored nation agreement* means any contractual provision or understanding that requires, or potentially requires, a price paid by one purchaser of lead-based antiknock compound be offered to one or more other purchasers of the seller.

II

It is ordered, That respondents Ethyl Corporation, E. I. Du Pont de Nemours and Company, PPG Industries, Inc., and Nalco Chemical Company, their successors and assigns, and their officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, individually, in con-

nection with the sale or distribution of lead-based antiknock compound in the United States, shall forthwith cease and desist from:

A. Publishing, distributing or communicating in any manner:

(1) notice to any actual or potential customer concerning any change or modification in the price of lead-based antiknock compound in advance of its actual effective date;

(2) information to any respondent concerning prices, discounts and other terms and conditions pertinent to the sale of lead-based antiknock compound, **[169]** except in connection with a bonafide sale to, or purchase from any respondent, or in connection with negotiations related thereto;

(3) for a period of thirty (30) days after any change or modification in the price of lead-based antiknock compound, any information in respect to, about, or concerning said price change or modification to any newspaper, trade journal, magazine, radio or television facility, or any other media, or to any representative thereof.

Provided, That nothing in subparagraph A above, shall be construed to prohibit any respondent from (1) conveying to an actual or potential customer the information necessary to respond in good faith to request to bid on or engage in negotiations regarding the purchase of any lead-based antiknock compound; (2) contracting to sell any lead-based antiknock compound at a price determined pursuant to such bid or negotiation which is effective on a specified future date subject to neither contingency nor condition; or (3) conveying information in compliance with any order, or in connection with participation in any proceeding, of a court, legislative body, or administrative agency.

B. Making any price change or modification in the price of lead-based antiknock compound applicable to purchase orders received prior to the effective date of such price change or modification.

C. Entering into any contract with any customer for the purchase or sale of lead-based antiknock compound which requires that advance notice of any price change or modification be given. **[170]**

D. Quoting or providing transportation on lead-based antiknock compound at a uniform charge to customers not similarly situated.

E. Quoting or selling lead-based antiknock compound to an actual or potential customer pursuant to a formula or method of pricing which systematically;

(1) matches the cost of such lead-based antiknock compound from any other producer thereof; or

(2) equalizes the cost of such lead-based antiknock compound to actual or potential customers.

Provided, That nothing in subparagraphs D and E above, shall be construed to prohibit a respondent from attempting in good faith in an individual transaction to meet the lower product price, transportation or other charge of a competitor; or stating to the customer its general willingness to meet such price or charges of a competitor.

F. Entering into a contract for the sale or delivery of lead-based antiknock compound with any customer containing a most favored nation agreement; or maintaining or complying with a most favored nation agreement in any contract for the sale or delivery of lead-based antiknock compound.

III

It is further ordered, That whenever a respondent offers a delivered price to a customer for the purchase of lead-based antiknock compound, said respondent shall offer the customer the option of a point of origin price at the respondent's [171] production facility from which shipment is to be made, and at the option of any actual or potential customer:

A. Allow any customer to arrange or furnish transportation for any purchased lead-based antiknock compound from the respondent's production facilities; or

B. Offer a separately-stated price for transportation furnished or arranged by the respondent.

IV

It is further ordered, That each respondent, individually, shall forthwith make its lead-based antiknock compound sales contracts and other agreements consistent with this Order, including but not limited to deleting from each:

A. Any provision or understanding whereby advance notice of a price change or modification in price of a lead-based antiknock compound is provided to a purchaser.

B. Any most favored nation agreement.

V

It is further ordered, That nothing contained in this Order shall be interpreted as prohibiting a respondent when acting individually, (1) from exercising its right to establish the price at which and to select the customers to which it shall sell; or (2) from selling at a point of origin or delivered price established in good faith to meet the equally low price of [172] a competitor. No pricing practice engaged in by a respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this Order.

VI

It is further ordered, That each respondent shall forthwith deliver a copy of this Order to all present and (for a period of ten years from the entry of this Order) future personnel, agents and representatives of respondents having sales, distribution or policy responsibilities regarding lead-based antiknock compound, and each respondent shall forward a copy of this Order to each of its purchasers during the past twelve months of any lead-based antiknock compound in the United States.

VII

It is further ordered, That each respondent notify the Commission at last thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergency of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order. **[173]**

VIII

It is further ordered, That each respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order and such additional reports thereafter as the Commission may require.

APPENDIX A

Respondents' Standard Antiknock Compounds

Type of Mix	Ethyl [1]	Du Pont [2]	PPG [3]	Nalco [4]
Straight Fluids	TEL Motor Mix	TEL Motor Antiknock	TEF Motor Mix	Nalkyl E-1
	TML Motor Mix	TML Motor Antiknock	TMF Motor Mix	Nalkyl M-1
	Aviation Mix	TEL Aviation Antiknock		
	Aviation Mix Dyed			
Reacted Mixes [5]	MLA 250 Mix	Tetramix 25 Antiknock	MAF Motor Mix 25R	Nalkyl ME 25
	MLA 500 Mix	Tetramix 50 Antiknock	MAF Motor Mix 50R	Nalkyl ME 50
	MLA 750 Mix	Tetramix 75 Antiknock	MAF Motor Mix 75R	Nalkyl ME 75
Physical Mixes [5]	TELMEL 10 [6]	PM-10	MAF Motor Mix 10P	----------
	TELMEL 25	PM-25	MAF Motor Mix 25P	----------
	TELMEL 50	PM-50	MAF Motor Mix 50P	----------
	TELMEL 75	PM-75	MAF Motor Mix 75P	----------

[1] CX 2A; Lockerbie, Tr. 698-99; Werling, Tr. 3619-21; CX 1953Z30-31.

[2] CX 597B; Tunis, Tr. 37-38.

[3] CX 1115A; CX 1163E; J. M. Robinson, Tr. 978-79.

[4] CX 1329A-B; Altman, Tr. 1244-45.

[5] For each company, the numerals in the name of the mix show what proportion of the antiknock compound in the fluid is TML. Thus, MLA 250 is one quarter TML and three-quarters TEL and PM-10 is 10 percent TML and 90 percent TEL. (*See,* Werling, Tr. 3619-20; Tunis, Tr. 38; CX 1163E; Altman, Tr. 1244).

[6] Ethyl's TELMEL 10 is identical in composition to Du Pont's PM-10 and PPG's MAF Motor Mix 10P. (*See,* Diggs, Tr. 2435; Werling, Tr. 3688). Ethyl's TELMEL 10 prices were not generally disseminated and that respondent (unlike Du Pont) did not consider TELMEL 10 to be standard mix. (Lockerbie, Tr. 698-99; Werling, Tr. 3649-50; CX 2C).

APPENDIX B

Respondents' Special or Non-Standard Antiknock Compounds

Type of Mix	Ethyl [1]	Du Pont [2]	PPG [3]	Nalco [4]
Straight Fluid	TEL Motor Special #1	TEL Motor Special Antiknock S-1	TEL Motor Mix C +	-------
	TEL Motor Special #1 Yellow [5]			
Reacted Mixes	MLA 500 Special #1	Tetramix 25 S-1 Tetramix 50 S-1	MAF Motor Mix 50R-C +	
Physical Mixes	TELMEL 10 [6]	PM-10	MAF Motor Mix 10P	

[1] Lockerbie, Tr. 698-99; Werling, Tr. 3619-22; CX 2A-C.
[2] CX 597B; Tunis, Tr. 39-40.
[3] Fremd, Tr. 1593-94.
[4] Nalco sold no special mixes during the period 1974-1979. (Altman, Tr. 6606)
[5] TEL Motor Special #1, yellow, is TEL Motor Special #1 with an orange dye added. (Werling, Tr. 3624; CX 1953Z262).
[6] Unlike Ethyl, Du Pont generally disseminated information about this mix (e.g., CX 1113Z24-33), as did PPG (e.g. CX 1140; 1135; 1164; 1129; 1124). For a short period of time, however, PPG removed MAF Motor Mix 10P from customer notices and press releases (CX 1131-32; 1660C). Only one customer purchased TELMEL from Ethyl. (Lockerbie, Tr. 820).

APPENDIX C

Respondents' Sales and Market Shares

Total sales of antiknock fluid to refiners in pounds and market shares of that market in each year 1974 through 1979 and the six-month period ending June 30, 1980 were as follows:

	Du Pont	Ethyl	Nalco	PPG	Total
			(in 000s)		
1974	393,067	343,015	121,035	165,541	1,022,658
	(38.4%)	(33.5%)	(11.8%)	(16.2%)	(100%)
1975	354,915	304,601	110,617	163,617	933,750
	(38.0%)	(32.6%)	(11.8%)	(17.5%)	(100%)
1976	373,868	325,821	125,932	174,059	999,680
	(37.4%)	(32.6%)	(12.6%)	(17.4%)	(100%)
1977	321,683	316,565	122,703	152,659	913,610
	(35.2%)	(34.6%)	(13.4%)	(16.7%)	(100%)
[***]	[***]	[***]	[***]	[***]	[***]
[***]	[***]	[***]	[***]	[***]	[***]
[***]	[***]	[***]	[***]	[***]	[***]

(REX 324 Z27)

APPENDIX D(i)

TEL AND TML LIST PRICE CHANGES
2-1-74 through 5-30-79

	Company	Customer Notification	Press Communication or Release	Date Published*	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
1	DuPont**	2/1/74[1]	2/5/74[2]	2/7/74(WSJ)[3]	38	3/11/74	41.00	+7.0***	43.00	+7.0***	1 CX 342;	6 CX 1621
	Ethyl**	2/1/74[4]	N/A	2/4/74(WSJ)[5]	38	3/11/74	41.58	+8.4	43.62	+8.4	CX 1970A	7 CX 1237
	Ethyl	2/6/74[6]	N/A	N/A	33	3/11/74	41.00	+7.0	43.00	+7.0	2 CX 973	8 CX 351
	PPG	N/A	2/8/74[7]	2/11/74(WSJ)[8]	—	3/11/74	41.00	+7.0	43.00	+7.0	3 CX 353	9 CX 1339
	Nalco	2/13/74[9]	N/A	N/A	26	3/11/74	41.00	+7.0	43.00	+7.0	4 CX 349	
											5 CX 354	
2	DuPont****	3/28/74[1]	3/28/74[2]	3/29/74(OD)[3]	39	5/6/74	43.96	+7.2	46.10	+7.2	1 CX 60;	6 CX 1683;
	Ethyl	3/29/74[4]	N/A	4/1/74(WSJ)[5]	38	5/6/74	43.96	+7.2	46.10	+7.2	CX 1970A	CX 1361
	Nalco	4/2/74[6]	N/A	N/A	34	5/6/74	43.96	+7.2	46.10	+7.2	2 CX 1106	7 CX 1161
	PPG	4/4/74[7]	4/5/74[8]	4/8/74(WSJ)[9]	32	5/6/74	43.96	+7.2	46.10	+7.2	3 CX 1591	8 CX 1658;
											4 CX 341	9 CX 1594
											5 CX 1592	
3	Ethyl	6/11/74[1]	6/11/74[2]	6/12/74(WSJ)[3]	37	7/18/74	47.40	+7.9	49.72	+7.9	1 CX 326	5 CX 329
	DuPont	6/13/74[4]	N/A	6/14/74(WSJ)[5]	—	7/18/74	47.40	+7.9	49.72	+7.9	2 CX 311	6 CX 1160
	PPG	6/14/74[6]	N/A	N/A	34	7/18/74	47.40	+7.9	49.72	+7.9	3 CX 1595	7 CX 1362
	Nalco	6/15/74[7]	N/A	N/A	33	7/18/74	47.40	+7.9	49.72	+7.9	4 CX 974	

* Abbreviations for publications:

"WSJ" — Wall Street Journal
"OD" — The Oil Daily
"J/C" — The Journal of Commerce
"CW" — Chemical Week
"NYT" — New York Times

** The Ethyl and Du Pont announcements were effectively simultaneous. Ethyl learned that Du Pont had made its apparently previous announcement only after Ethyl had communicated with its customers. (CX 342). Also verified by CX 1970 which contains the dates that Mr. Werling understood rivals to have made their announcement. (Werling, Tr. 3639–40). Du Pont customer notification is unavailable. The date of customer notification is derived from Ethyl documents which indicate February 1, 1974 as the latest date Du Pont could have notified its customers. (Id). In 1974 and early 1975, Du Pont's customers received price change notifications by telex or mailgram in a form similar to the latter portion of the core period. (Diggs, Tr. 2419–20).

*** Percentage change for this round is taken from CX 1970A.

**** Du Pont customer notification is unavailable. The date of customer notification is derived from Ethyl documents which indicate March 28, 1974 as the lastest date Du Pont could have notified its customers. (CX 60; 1510A).

APPENDIX D(ii)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
4	DuPont*	6/24/74[1]	6/24/74[2]	6/25/74(WSJ)[3]	37	7/31/74	48.60	+2.5	50.92	+2.4	1 CX 58;	5 CX 312
	Ethyl	6/26/74[4]	6/26/74[5]	6/28/74(WSJ)[6]	35	7/31/74	48.60	+2.5	50.92	+2.4	CX 1970A	6 CX 315
	PPG	6/28/74[7]	N/A	N/A	33	7/31/74	48.60	+2.5	50.92	+2.4	2 CX 975	7 CX 1159
	Nalco	undated[8]	7/5/74[9]	N/A	—	7/31/74	48.60	+2.5	50.92	+2.4	3 CX 316	8 CX 1359
											4 CX 313	9 CX 1396
5	DuPont**	8/21/74[1]	8/21/74[2]	8/21/74(WSJ)[3]	37	9/27/74	54.44	+12.0	58.04	+14.0	1 CX 1970A	6 CX 309
	Ethyl	8/26/74[4]	8/26/74[5]	8/27/74(WSJ)[6]	32	9/27/74	54.44	+12.0	58.04	+14.0	2 CX 976	7 CX 1151
	PPG	8/27/74[7]	N/A	8/30/74(WSJ)[8]	31	9/27/74	54.44	+12.0	58.04	+14.0	3 CX 310	8 CX 307
	Nalco	8/27/74[9]	8/27/74[10]	N/A	31	9/27/74	54.44	+12.0	58.04	+14.0	4 CX 300	9 CX 1358
											5 CX 299	10 CX 1363
6	Ethyl	3/13/75[1]	3/13/75[2]	3/14/75(WSJ)[3]	35	4/17/75	57.51	+5.6	61.23	+5.5	1 CX 62	5 CX 292
	DuPont	N/A	3/17/75[4]	3/18/75(WSJ)[5]	—	4/17/75	57.51	+5.6	61.23	+5.5	2 CX 284	6 CX 1150
	PPG	3/17/75[6]	N/A	N/A	31	4/17/75	57.51	+5.6	61.23	+5.5	3 CX 295	7 CX 1457
	Nalco	3/17/75[7]	N/A	N/A	31	4/17/75	57.51	+5.6	61.23	+5.5	4 CX 977	
7	Ethyl	5/14/75[1]	5/14/75[2]	5/15/75(WSJ)[3]		5/15/75	56.81	-1.2	60.53	-1.1	1 CX 278	9 CX 281
	DuPont***	5/14/75[4]	5/14/75[5]	5/15/75(WSJ)[6]		5/15/75	57.21	-0.5	60.93	-0.5	2 CX 277	10 CX 1147
	DuPont	5/15/75[7]	5/15/75[8]	5/19/75(OD)[9]		5/15/75	56.81	-1.2	60.53	-1.1	3 CX 282	11 CX 1659
	PPG	5/16/75[10]	5/19/75[11]	5/20/75(WSJ)[12]		5/15/75	56.81	-1.2	60.53	-1.1	4 CX 640A-B	12 CX 1596
	Nalco	5/16/75[13]	5/16/75[14]	5/20/75(OD)[15]		5/15/75	56.81	-1.2	60.53	-1.1	5 CX 640C	13 CX 1357
											6 CX 282	14 CX 1393
											7 CX 644	15 CX 280
											8 CX 645	

* Du Pont customer notification is unavailable. The date of customer notification is derived from Ethyl documents which indicate June 24, 1974 as the latest date Du Pont could have notified its customers. (CX 58; 1970A).

** Du Pont customer notification is unavailable. The date of customer notification is derived from Ethyl documents which indicate August 21, 1974 as the latest date Du Pont could have notified its customers. (CX 1970A).

*** Documents indicate that decisions of Ethyl and Du Pont were made simultaneously without knowledge of the other's action. (CX 927; 595).

APPENDIX D(iii)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
8	Ethyl	6/2/75[1]	6/2/75[2]	6/3/75(NYT)[3]		6/3/75	55.81	-1.8	59.53	-1.7	1 CX 266	7 CX 1336
	DuPont	6/3/75[4]	6/3/75[5]	6/4/75(WSJ)[6]		6/3/75	55.81	-1.8	59.53	-1.7	2 CX 267	8 CX 1501
	Nalco	6/3/75[7]	6/3/75[8]	6/4/75(WSJ)[9]		6/3/75	55.81	-1.8	59.53	-1.7	3 CX 690	9 CX 274
	PPG	6/3/75[10]	6/3/75[11]	6/4/75(WSJ)[12]		6/3/75	55.81	-1.8	59.53	-1.7	4 CX 669	10 CX 1145
											5 CX 978	11 CX 1144
											6 CX 274	12 CX 274
9	DuPont	8/14/75[1]	8/14/75[2]	8/15/75(WSJ)[3]	36	9/19/75	56.31	+0.9	60.03	+0.8	1 CX 692	7 CX 1140
	Ethyl	8/15/75[4]	8/15/75[5]	8/18/75(WSJ)[6]	35	9/19/75	56.31	+0.9	60.03	+0.8	2 CX 979	8 CX 1238
	PPG	8/18/75[7]	8/18/75[8]	8/19/75(J/C)[9]	32	9/19/75	56.31	+0.9	60.03	+0.8	3 CX 264	9 CX 693
	Nalco	8/18/75[10]	N/A	8/19/75(J/C)[11]	32	9/19/75	56.31	+0.9	60.03	+0.8	4 CX 256	10 CX 1337
											5 CX 260	11 CX 693
											6 CX 696	
10	DuPont	12/10/75[1]	12/11/75[2]	12/12/75(WSJ)[3]	37	1/16/76	59.52	+5.7	63.45	+5.7	1 CX 700	9 CX 722
	Ethyl*	12/11/75[4]	12/11/75[5]	12/12/75(WSJ)[6]	36	1/16/76	58.90	+4.6	62.78	+4.6	2 CX 702	10 CX 1338
	DuPont	12/15/75[7]	12/15/75[8]	12/16/75(WSJ)[9]	32	1/16/76	58.90	+4.6	62.78	+4.6	3 CX 711	11 CX 1465
	Nalco	12/16/75[10]	12/16/75[11]	12/18/75(OD)[12]	31	1/16/76	58.90	+4.6	62.78	+4.6	4 CX 231	12 CX 716
	PPG	12/16/75[13]	12/17/75[14]	12/18/75(WSJ)[15]	31	1/16/76	58.90	+4.6	62.78	+4.6	5 CX 228	13 CX 1135
											6 CX 255	14 CX 1660A
											7 CX 713	15 CX 718
											8 CX 980	
11	Ethyl	3/12/76[1]	3/12/76[2]	3/15/76(WSJ)[3]	35	4/16/76	59.70	+1.4	63.58	+1.3	1 CX 189	7 CX 1164
	DuPont	3/15/76[4]	3/15/76[5]	3/16/76(WSJ)[6]	32	4/16/76	59.70	+1.4	63.58	+1.3	2 CX 188	8 CX 1660B
	PPG	3/16/76[7]	3/16/76[8]	3/17/76(WSJ)[9]	31	4/16/76	59.70	+1.4	63.58	+1.3	3 CX 734	9 CX 732
	Nalco	3/18/76**[10]	N/A	3/22/76(OD)[11]	—	4/16/76	59.70	+1.4	63.58	+1.3	4 CX 725A	10 CX 1334
											5 CX 1107	11 CX 192
											6 CX 194	

* Ethyl's announcement was made independent of any knowledge of Du Pont's previous move. (CX 55; 1970A).

** Date cited is date customer notice was received in Nalco's Freeport, Texas, plant. Nalco customarily gave company officials notice simultaneous with that to customers (e.g., CX 1510A-C; 1511; 1513A-C; 1508; 1516; 1346; 1476). Therefore "customer notification" would not have occurred after this date.

APPENDIX D(iv)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
12	DuPont	4/15/76[1]	N/A	4/16/76(OD)[2]	39	5/24/76	60.50	+1.3	64.38	+1.3	1 CX 742	6 CX 1134
	Ethyl	4/19/76[3]	4/19/76[4]	4/20/76(WSJ)[5]	35	5/24/76	60.50	+1.3	64.38	+1.3	2 CX 184	7 CX 1660C
	PPG	4/22/76[6]	4/22/76[7]	4/23/76(WSJ)[8]	32	5/24/76	60.50	+1.3	64.38	+1.3	3 CX 2A	8 CX 182
	Nalco	N/A	4/26/76[9]	4/27/76(OD)[10]	—	5/24/76	60.50	+1.3	64.38	+1.3	4 CX 172	9 CX 1463
											5 CX 748	10 CX 180
13	DuPont	7/9/76[1]	7/9/76[2]	7/12/76(WSJ)[3]	35	8/13/76	62.30	+3.0	65.38	+1.6	1 CX 754	7 CX 1132
	Ethyl	7/13/76[4]	7/13/76[5]	7/14/76(WSJ)[6]	31	8/13/76	62.30	+3.0	65.38	+1.6	2 CX 1108	8 CX 1131
	PPG	7/13/76[7]	7/15/76[8]	7/14/76(OD)[9]	31	8/13/76	62.30	+3.0	65.38	+1.6	3 CX 170	9 CX 764
	Nalco	7/14/76[10]	7/19/76[11]	7/22/76(J/C)[12]	30	8/13/76	62.30	+3.0	65.38	+1.6	4 CX 3A	10 CX 1496
											5 CX 35	11 CX 1497
											6 CX 763	12 CX 758
14	Ethyl	10/11/76[1]	10/11/76[2]	10/12/76(OD)[3]	38	11/18/76	65.40	+5.0	68.48	+4.7	1 CX 4	7 CX 1129
	DuPont	10/13/76[4]	10/13/76[5]	10/14/76(OD)[6]	36	11/18/76	65.40	+5.0	68.48	+4.7	2 CX 153	8 CX 1660D
	PPG	10/14/76[7]	10/15/76[8]	10/18/76(OD)[9]	35	11/18/76	65.40	+5.0	68.48	+4.7	3 CX 781	9 CX 157
	Nalco	10/14/76[10]	10/18/76[11]	10/18/76(OD)[12]	35	11/18/76	65.40	+5.0	68.48	+4.7	4 CX 771	10 CX 1490
											5 CX 772	11 CX 1493
											6 CX 160	12 CX 157
15	Ethyl	1/21/77[1]	1/21/77[2]	1/24/77(OD)[3]	34	2/24/77	66.20	+1.2	69.28	+1.2	1 CX 8	7 CX 1128
	DuPont*	1/24/77[4]	1/24/77[5]	1/25/77(WSJ)[6]	31	2/24/77	66.20	+1.2	69.28	+1.2	2 CX 34	8 CX 1660E
	PPG	1/24/77[7]	1/26/77[8]	1/27/77(WSJ)[9]	31	2/24/77	66.20	+1.2	69.28	+1.2	3 CX 797	9 CX 792
	PPG**	1/27/77[10]	N/A	N/A	—	3/1/77	66.20	+1.2	69.28	+1.2	4 CX 786	10 CX 1210
	Nalco	1/27/77***[11]	1/27/77[12]	N/A	—	3/1/77	66.20	+1.2	69.28	+1.2	5 CX 1109	11 CX 1349
											6 CX 149; CX 148	12 CX 1471

* Du Pont's initial announcement to customers and the press indicated an effective date of February 24, 1977. (CX 786, 1109). Apparently as the result of an error, the effective date was published as March 1, 1977. (CX 149). This error was subsequently corrected and published in the Wall St. Journal on January 26 and on January 27 in the Oil Daily. (CX 147–48).

** PPG changed only the effective date; new prices remained as previously announced. (CX 1210).

*** Date cited is date customer notice was received in Nalco's Freeport, Texas, plant. Nalco customarily gave company officials notice with that to customers (e.g., CX 1510A–C; 1511; 1513A–C; 1508; 1516; 1346; 1476). Therefore "customer notification" would not have occurred after this date.

APPENDIX D(v)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
16	DuPont	2/9/77[1]	2/9/77[2]	2/10/77(WSJ)[3]	35	3/16/77	66.60	+0.6	69.68	+0.6	1 CX 802	7 CX 1124
	Ethyl	2/11/77[4]	2/11/77[5]	2/14/77(WSJ)[6]	33	3/16/77	66.60	+0.6	69.68	+0.6	2 CX 800	8 CX 1660F
	PPG	2/14/77[7]	undated[8]	2/22/77(WSJ)[9]	30	3/16/77	66.60	+0.6	69.68	+0.6	3 CX 136	9 CX 130
	Nalco	2/15/77[10]	2/16/76[11]	2/17/77(WSJ)[12]	31	3/16/77	66.60	+0.6	69.68	+0.6	4 CX 9	10 CX 1347
											5 CX 125	11 CX 1468; CX 1469; CX 1475
											6 CX 807	12 CX 132
17	Ethyl	3/1/77[1]	3/1/77[2]	3/2/77(WSJ)[3]	34	4/4/77	67.40	+1.2	70.48	+1.1	1 CX 13	9 CX 120
	DuPont*	3/1/77[4]	3/1/77[5]	3/2/77(WSJ)[6]	37	4/7/77	68.60	+3.0	71.68	+2.9	2 CX 33	10 CX 1122
	DuPont**	3/4/77[7]	3/4/77[8]	3/7/77(WSJ)[9]	—	4/7/77	67.40	+1.2	70.48	+1.1	3 CX 833	11 CX 1660G
	PPG	3/7/77[10]	undated[11]	3/9/77(WSJ)[12]	31	4/7/77	67.40	+1.2	70.48	+1.1	4 CX 814	12 CX 118
	Nalco	3/7/77[13]	3/9/77[14]	3/9/77(OD)[15]	31	4/7/77	67.40	+1.2	70.48	+1.1	5 CX 821	13 CX 1344
	Ethyl***	3/18/77[16]	N/A	N/A	—	4/7/77	67.40	+1.2	70.48	+1.1	6 CX 122	14 CX 1484
											7 CX 818.	15 CX 117
											8 CX 1113Z69	16 CX 12
18	Ethyl	4/19/77[1]	4/19/77[2]	4/20/77(WSJ)[3]	37	5/26/77	69.20	+2.7	72.28	+2.6	1 CX 16	6 CX 96
	DuPont	4/20/77[4]	4/21/77[5]	4/22/77(WSJ)[6]	36	5/26/77	69.20	+2.7	72.28	+2.6	2 CX 90	7 CX 1121
	PPG	4/21/77[7]	undated[8]	4/26/77(WSJ)[9]	35	5/26/77	69.20	+2.7	72.28	+2.6	3 CX 845	8 CX 1660H
	Nalco	4/25/77[10]	4/26/77[11]	4/27/77(WSJ)[12]	31	5/26/77	69.20	+2.7	72.28	+2.6	4 CX 837	9 CX 840
											5 CX 909A-B; CX 96	10 CX 1390A
												11 CX 1390B
												12 CX 95

* Ethyl and Du Pont made simultaneous announcements without prior knowledge of the other's actions. (CX 50; 938A; 1970B).

** Changed prices only; effective date remained as previously announced. (CX 818).

*** Changed effective date only; new prices remained as previously announced. (CX 12).

APPENDIX D(vi)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
19	DuPont	8/15/77[1]	8/17/77[2]	8/17/77(OD)[3]	31	9/15/77	74.90	+8.2	77.98	+7.9	1 CX 850	7 CX 853
	Ethyl	8/19/77[4]	8/19/77[5]	8/22/77(WSJ)[6]	34	9/22/77	73.62	+6.4	76.14	+5.3	2 CX 1111; CX 66	8 CX 370
	DuPont	8/22/77[7]	N/A	8/23/77(OD)[8]	31	9/22/77	73.62	+6.4	76.14	+5.3	3 CX 66	9 CX 1120
	PPG	8/22/77[9]	N/A	N/A	31	9/22/77	73.62	+6.4	76.14	+5.3	4 CX 19	10 CX 1346; CX 1476
	Nalco	8/23/77[10]	8/24/77[11]	8/25/77(WSJ)[12]	30	9/22/77	73.62	+6.4	76.14	+5.3	5 CX 101	11 CX 1478
											6 CX 858	12 CX 108
20	DuPont	12/15/77[1]	12/19/77[2]	12/19/77(OD)[3]	35	1/19/78	75.82	+3.0	78.34	+2.9	1 CX 863	6 CX 1404
	Ethyl	12/20/77[4]	12/21/77[5]	12/23/77(OD)[6]	34	1/23/78	74.42	+1.1	76.94	+1.1	2 CX 1113Z72; CX 868	7 CX 1113Z36
	DuPont	12/21/77[7]	N/A	12/23/77(OD)[8]	33	1/23/78	74.42	+1.1	76.94	+1.1	3 CX 81	8 CX 1404
	PPG*	12/22/77[9]	N/A	12/28/77(OD)[10]	32	1/23/78	74.42	+1.1	76.94	+1.1	4 CX 80	9 CX 1119
	Nalco	12/27/77**[11]	N/A	N/A	—	1/23/78	74.42	+1.1	76.94	+1.1	5 CX 535	10 CX 1403
												11 CX 1345
21	Ethyl	5/5/78[1]	5/9/78[2]	5/10/78(OD)[3]		5/5/78	73.62	-1.1	76.14	-1.0	1 CX 482	6 CX 420
	DuPont	5/5/78[4]	5/9/78[5]	5/10/78(OD)[6]		5/5/78	73.62	-1.1	76.14	-1.0	2 CX 420	7 CX 1245
	PPG***	5/5/78[7]	5/9/78[8]	5/10/78(OD)[9]		5/5/78	73.62	-1.1	76.14	-1.0	3 CX 420	8 CX 420
	Nalco	5/9/78[10]	N/A	N/A		5/5/78	73.62	-1.1	76.14	-1.0	4 CX 1113Z38	9 CX 420
											5 CX 1113Z74; CX 420	10 CX 1401-02
22	Ethyl	5/26/78[1]	N/A	N/A		5/26/78	73.62		73.62	-3.3	1 CX 478	
	DuPont	5/26/78[2]		N/A		5/26/78	73.62		73.62	-3.3	2 CX 1113Z40	
	PPG	5/30/78[3]	N/A	N/A		5/26/78	73.62		73.62	-3.3	3 CX 1247	
	Nalco	undated[4]	N/A	N/A		5/26/78	73.62		73.62	-3.3	4 CX 1516	

* PPG first notified customers of the change on December 22, 1977. (CX 1119). The notice sent contained an error made by Western Union. This was corrected by notice sent on December 27, 1977. (CX 1116-18).

** Date cited is date customer notice was received in Nalco's Freeport, Texas, plant. Nalco customarily notified company officials simultaneous with notification to customers (e.g., CX 1510A-C; 1511; 1513A-C; 1508; 1516; 1346; 1476). Therefore "customer notification" would not have occurred after this date.

*** PPG first notified customers of the change on May 5, 1978. (CX 1245; CX 1388). Western Union again erred on this mailgram. This was corrected by notice sent on May 8, 1978. (CX 1246).

APPENDIX D(vii)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
23	DuPont	6/30/78[1]	6/30/78[2]	7/3/78(OD)[3]		6/30/78	73.62		71.10	-3.4	1 CX 1113Z42	4 CX 393
	Ethyl	6/30/78[4]	N/A	7/6/78(OD)[5]		6/30/78	73.62		71.10	-3.4	2 CX 1113Z75;	5 CX 419
	PPG	6/30/78[6]	N/A	7/7/78(OD)[7]		6/30/78	73.62		71.10	-3.4	CX 422;	6 CX 1248
	Nalco	7/5/78[8]	N/A	N/A		6/30/78	73.62		71.10	-3.4	McNally,	7 CX 422
											Tr. 2192-94	8 CX 1406;
											3 CX 422	CX 1407
24	PPG	7/5/78[1]	7/6/78*[2]	7/7/78(OD)[3]		7/6/78	71.10	-3.4	71.10		1 CX 1461	5 CX 1113Z44
	Nalco	7/5/78[4]	N/A	N/A		7/6/78	71.10	-3.4	71.10		2 CX 1239;	6 CX 467
	DuPont	7/6/78[5]	N/A**	N/A		7/6/78	71.10	-3.4	71.10		CX 422	
	Ethyl	7/6/78[6]	N/A	N/A		7/6/78	71.10	-3.4	71.10		3 CX 422	
											4 CX 1406;	
											CX 1407	
25	Ethyl	8/7/78[1]	N/A	N/A	33	9/9/78	71.90	+1.1	71.90	+1.1	1 CX 464	
	DuPont	8/9/78[2]	N/A***	N/A	31	9/9/78	71.90	+1.1	71.90	+1.1	2 CX 1113Z47	
	PPG	8/10/78[3]	N/A	N/A	30	9/9/78	71.90	+1.1	71.90	+1.1	3 CX 1244	
	Nalco	8/10/78[4]	N/A	N/A	30	9/9/78	71.90	+1.1	71.90	+1.1	4 CX 1408	
26	Ethyl	9/13/78[1]	N/A	9/18/78(OD)[2]	33	10/16/78	72.70	+1.1	72.70	+1.1	1 CX 458	5 CX 1250
	DuPont	9/14/78[3]	N/A****	9/18/78(OD)[4]	32	10/16/78	72.70	+1.1	72.70	+1.1	2 CX 417	6 CX 417
	PPG	9/15/78[5]	N/A	9/18/78(OD)[6]	31	10/16/78	72.70	+1.1	72.70	+1.1	3 CX 1113Z49	7 CX 1513
	Nalco	9/15/78[7]	N/A	N/A	31	10/16/78	72.70	+1.1	72.70	+1.1	4 CX 417	

* PPG's press release (CX 1239) is undated, although it was carried on the Chemweek Newswire on July 5, 1978. (CX 423). It was communicated to the Oil Daily on July 6 where it appeared the following day. (CX 422).

** Standby statement was prepared but there is no indication it was carried in the press. (CX 1113Z76).

*** Standby statement was prepared but there is no indication it was read to press. (CX 1113Z77).

**** Mailgrams to customers were used as standby statements by Du Pont. (CX 1113Z84). There is no indication that this was read to the press.

APPENDIX D(viii)

	Company	Customer Notification	Press Communication or Release	Date Published	Days Notice	Date Change Effective	New TEL cents/lb.	% Change	New TML cents/lb.	% Change	Notes	
27	Ethyl	10/13/78[1]	N/A	10/17/78(OD)[2]	34	11/16/78	73.50	+1.1	73.50	+1.1	1 CX 452	5 CX 414
	DuPont	10/17/78[3]	10/17/74[4]	10/17/78(OD)[5]	31	11/16/78	73.50	+1.1	73.50	+1.1	2 CX 415	6 CX 1260
	PPG	10/16/78[6]	N/A	10/20/78(OD)[7]	31	11/16/78	73.50	+1.1	73.50	+1.1	3 CX 1113Z51	7 CX 416
	Nalco	10/18/78[8]	N/A	10/20/78(OD)[9]	30	11/17/78	73.50	+1.1	73.50	+1.1	4 CX 1113Z51	8 CX 1510
											CX 414	9 CX 416
28	Ethyl	1/2/79[1]	1/3/79[2]	1/5/79(OD)[3]	34	2/5/79	77.80	+5.9	77.80	+5.9	1 CX 441	7 CX 1252
	DuPont	1/4/79[4]	1/5/79**[5]	1/5/79(OD)[6]	32	2/5/79	77.80	+5.9	77.80	+5.9	2 CX 425A-B	8 CX 443
	PPG	1/5/79[7]	N/A	1/8/79(OD)[8]	31	2/5/79	77.80	+5.9	77.80	+5.9	3 CX 447	9 CX 1508
	Nalco	1/5/79[9]	N/A	N/A	38	2/12/79	77.80	+5.9	77.80	+5.9	4 CX 1113Z53	10 CX 442
	Ethyl*	1/16/79[10]	N/A	N/A	—	2/12/79	77.80	+5.9	77.80	+5.9	5 CX 1113Z53;	11 CX 1113Z55
	DuPont*	1/18/79[11]	N/A	N/A	—	2/12/79	77.80	+5.9	77.80	+5.9	CX 447	12 CX 1243
	PPG*	1/18/79[12]	N/A	N/A	—	2/12/79	77.80	+5.9	77.80	+5.9	6 CX 447	
29	DuPont	2/1/79[1]	2/6/79**[2]	2/6/79(OD)[3]	33	3/6/79	78.60	+1.0	78.60	+1.0	1 CX 1113Z57	6 CX 1600
	PPG	2/2/79[4]	2/6/79**[5]	2/6/79(OD)[6]	32	3/6/79	78.60	+1.0	78.60	+1.0	2 CX 1113Z57;	7 CX 436
	Ethyl	2/8/79[7]	N/A	2/9/79(OD)[8]	34	3/14/79	79.40	+2.1	79.40	+2.1	CX 1600	8 CX 1601
	DuPont	2/9/79[9]	N/A	N/A	33	3/14/79	79.40	+2.1	79.40	+2.1	3 CX 1600	9 CX 1113Z59
	PPG	2/12/79[10]	N/A	N/A	30	3/14/79	79.40	+2.1	79.40	+2.1	4 CX 1242	10 CX 1256
	Nalco	2/13/79[11]	N/A	N/A	29	3/14/79	79.40	+2.1	79.40	+2.1	5 CX 1600	11 CX 1504
30	DuPont	3/13/79[1]	3/14/79[2]	3/15/79(OD)[3]	34	4/16/79	81.00	+2.0	81.00	+2.0	1 CX 1113Z61	
	Ethyl	3/14/79[4]	3/16/79[5]	N/A	33	4/16/79	81.00	+2.0	81.00	+2.0	2 CX 1113Z61; CX 1602	
	PPG	3/16/79[6]	N/A	N/A	31	4/16/79	81.00	+2.0	81.00	+2.0	3 CX 1602	
	Nalco	3/19/79[7]	N/A	N/A	30	4/18/79	81.00	+2.0	81.00	+2.0	4 CX 392	
	Ethyl*	4/12/79[8]	N/A	N/A	—	4/18/79	81.00	+2.0	81.00	+2.0	5 CX 427A-B	
	DuPont*	unknown[9]	N/A	N/A	—	4/18/79	81.00	+2.0	81.00	+2.0	6 CX 1241	
											7 CX 1397	
											8 CX 421	
											9 CX 1080B; McNally, Tr. 2242	

* Changed only the effective date, price remained as previously announced.

** The date of actual press contact is unavailable. Date cited is date of publication since actual communication could have occured no later than this date.

APPENDIX E

[***]

APPENDIX F

[***]

APPENDIX G

Comparison of Du Pont's Domestic and Export Sales Price and Margins

	1974	1975	1976	1977	1978	1979 (5 months)
Net Average Domestic Price* (cents per pound)	44.08	54.95	59.57	67.68	[***]	[***]
Net Average Export Price** (cents per pound)	36.39	51.23	49.85	54.28	[***]	[***]
Domestic Unit Margins*** (cents per pound)	14.69	18.72	22.07	22.87	[***]	[***]
Export Unit Margins**** (cents per pound)	7.44	18.25	13.75	12.97	[***]	[***]

Source: CX 1963Z27; 1964Z32; 1965Z26; 1966Z30; 1967Z15; 1968R; Merkle, Tr. 5327-29.

* [***]
** [***]
*** Gross dollar domestic profits divided by pounds of product sold.
**** Gross foreign profits divided by pounds of product sold.

APPENDIX H

Comparison of PPG's Domestic and Export Sales Prices

	1975	1976	1977	1978	1979 (5 months)
Net Average Domestic Price* (cents per pound)	51.45	53.48	59.41	[***]	[***]
Net Average Export Price** (cents per pound)	32.63	43.43	43.00	[***]	[***]

* [***]
** [***]

APPENDIX I

Gross Profit Comparisons - Ethyl, Du Pont, and Nalco

		ETHYL		DU PONT		NALCO	
		Gross Profit Per Unit Current Dollars*	1974 Constant Dollars	Standard Gross Margins Per Unit Current Dollars**	1974 Constant Dollars	Gross Earnings Per Unit Current Dollars***	1974 Constant Dollars
1974 -	Annual	16.8	16.8	14.7	14.7	13.8	13.8
1975 -	Annual	20.8	19.0	18.7	17.1	11.8	10.8
1976 -	Annual	24.3	21.1	22.1	19.2	13.5	11.7
1977 -	First Qtr.	25.8	21.6	21.7	18.2	15.6	13.1
	Second Qtr.	26.0	21.4	22.8	18.8	14.2	11.7
	Third Qtr.	27.0	22.0	22.4	18.2	17.2	14.0
	Fourth Qtr.	27.8	22.3	26.4	21.1	18.8	15.1
		[***]	[***]	[***]	[***]	[***]	[***]

NOTE: Constant 1974 dollar volume are based on the gross national product price deflator. (Hay, Tr. 3847-49).

* Source: CX 493A.

** Source: CS 1963Z27; 1964Z32; 1965Z26; 1966L, Y, Z15, Z30; 1967J, W, Z15; 1968J, V, Z9, Z18. Standard gross margins per unit are calculated by dividing standard gross margin by the number of units for the period in question.

*** Source: CX 1775C; 1776G, M, S; 1777A, G, M, S; 1778A; 1779A; 1780A, I, O, S. Gross earnings per unit are calculated by dividing gross earnings by total net sales.

**** Du Pont data for September 1978 is not available; consequently, neither third nor fourth quarter figures are calculated.

APPENDIX J

Respondent's Profits Calculated For Benchmark Comparisons

	1974	1975	1976	1977	1978	1979
Ethyl (%) (CX 2097A-B; Pidano, Tr. 7413-16)	33.2	36.1	49.9	42.4	[***]	[***]
Du Pont (%) (CX 2101; Pidano, Tr. 7383-85).	20.6	27.5	32.2	23.7	[***]	[***]
PPG (%) (CX 2105; Pidano, Tr. 7408-13)	17.7	26.7	23.4	13.1	[***]	[***]
Nalco (%) (CX 2103; Pidano, Tr. 7396).	19.5	16.6	18.7	24.4	[***]	[***]

* Data not available. PPG profit information is sufficient to perform the necessary calculations only for 1974-1978. (CX 1280D-E; Pidano, Tr. 7408. PPG's data for 1979 was calculated in a different fashion from that reflected in CX 2105. (RPX 1529B)

** Data not available. Nalco profit information is sufficient to perform the necessary calculations only for 1974-1977. (CX 1332A-B; Pidano, Tr. 7396)

APPENDIX K(i)

Price Changes Special Antiknock Compounds

Company	Mix	Approximate Date of Price Change	Initial (Differing) Prices	Roll Back Price	Difference in cents/pound	Notes
Du Pont*	Tetramix 50 S-1	May 1974	47.42[1]	47.42[3]	.28	1 CX 339
Ethyl	MLA 500 Special #1	May 1974	47.70[2]			2 CX 339
						3 CX 339
						4 CX 340
Du Pont*	TEL Special	May 1974	45.51[4]	45.51[6]	.27	5 CX 340
Ethyl	TEL Motor Special	May 1974	45.78[5]			6 CX 340
Du Pont	Tetramix 50 S-1	July 1974	52.55[1]	52.55[2]	unknown	1 CX 320
Ethyl	MLA 500 Special #1	July 1974	unknown**			2 CX 319
Du Pont	TEL Special	July 1974	50.57[3]	50.57[4]	unknown	3 CX 321, 322
	TEL Motor Mix	July 1974	unknown**			4 CX 319
Ethyl	MLA 500 Special #1	June 1975	60.85[1]	60.85[3]	.03	1 CX 269
Du Pont	Tetramix 50 S-1	June 1975	60.88[2]			2 CX 674-78
						3 CX 930
Ethyl	MLA 500 Special #1	Sept. 1975	61.38[1]	61.38[3]	.03	1 CX 257C
Du Pont	Tetramix 50 S-1	Sept. 1975	61.41[2]			2 CX 692D-I
						3 CX 699A-F

* Du Pont price information has been taken from the files of Ethyl, which lowered these special mix prices to match Du Pont. (CX 338; 340).

** Documentation of Du Pont's special mix prices is unavailable. Du Pont's prices are taken from Ethyl documents and testimony which indicate that Ethyl rolled back on both special mixes to match Du Pont. Documentation showing the initial Ethyl price or the amount of the roll back is also unavailable. (CX 319-22; Werling, Tr. 3651-53).

APPENDIX K(ii)

Company	Mix	Approximate Date of Price Change	Initial (Differing) Prices	Roll Back Price	Difference in cents/pound	Notes
Du Pont*	PM-10	January 1976	59.27[1]			1 CX 714
PPG	MAF 10-P	January 1976	59.29[2]			2 CX 1135
Ethyl	TELMEL 10	January 1976	59.29[3]	59.27[4]	.02	3 CX 236 4 CX 1608
Du Pont	PM-10	April 1976	60.07[1]			1 CX 725
PPG	MAF 10-P	April 1976	60.09[2]			2 CX 1164
Ethyl	TELMEL 10	April 1976	60.09[3]	60.07[4]	.02	3 CX 190 4 CX 176
Du Pont	Tetramix 50 S-1	April 1976	64.87[5]			5 CX 726A-G; CX 728A-G
Ethyl	MLA 500 Special #1	April 1976	65.05[6]	64.87[7]	.18	6 CX 190 7 CX 186

* Ethyl and Du Pont simultaneously announced differing prices. (CX 935A-B, 55). Du Pont rolled back its prices across the board to match Ethyl's (CX 935A-B), but the new price for PM-10 (CX 714) still differed from the initial Ethyl price on TELMEL 10 (CX 236). Du Pont widely disseminated PM-10 mix prices and, therefore, considered it a standard mix. (E.g., CX 714). Ethyl did not widely disseminate its TELMEL 10 prices and as a result considered it to be a special mix. (E.g., CX 231; Werling, Tr. 3650-51).

APPENDIX K(iii)

Company	Mix	Approximate Date of Price Change	Initial (Differing) Prices	Roll Back Price	Difference in cents/pound	Notes
Du Pont	PM-10	May 1976	60.87[1]			1 CX 741
PPG	MAF 10-P	May 1976	60.87[2]	*		2 CX 1696; CX 175
Ethyl	TELMEL 10	May 1976	60.89[3]	60.87[4]	.02	3 CX 2C 4 CX 177
Ethyl	MLA 500 Special #1	May 1976	65.72[5]			5 CX 2B
Du Pont	Tetramix 50 S-1	May 1976	65.73[6]	65.72[7]	.01	6 CX 744A-E; CX 743 7 CX 740A-F; CX 948
Ethyl	MLA 500 Special #1	Feb. 1977	71.20[1]			1 CX 7
Du Pont	Tetramix 50 S-1	Feb. 1977	71.22[2]	71.20[3]	.02	2 CX 788A-F 3 CX 787A-F
Du Pont	Tetramix 50 S-1	March 1977	71.62[1]		.01	1 CX 804A-F
Ethyl	MLA 500 Special #1	March 1977	71.63[2]	**		2 CX 11
Du Pont***	Tetramix 50 S-1	April 1977	72.46[1]		.02	1 CX 820A-F
Ethyl	MLA 500 Special #1	April 1977	72.48[2]	**		2 CX 15

* PPG removed MAF 10-P from general customer announcements (CX 1133) and press releases (CX 1660C). Ethyl documents, however, indicate that PPG matched the Du Pont price. (CX 1696; 175).

** There is no documented evidence of a roll back, although according to record evidence it was Ethyl's practice to match rivals' prices. (CX 1953Z86; 177).

*** Ethyl and Du Pont simultaneously announced different prices. (CX 955; 815A-F). Du Pont rolled back its prices across the board to match Ethyl but its new price for Tetramix 50 S-1 (CX 820A-F) still differed from the initial Ethyl price on MLA 500 Special. (CX 15).

APPENDIX K(iv)

Company	Mix	Approximate Date of Price Change	Initial (Differing) Prices	Roll Back Price	Difference in cents/pound	Notes
Du Pont Ethyl	Tetramix 50 S-1 MLA 500 Special #1	May 1977 May 1977	74.26[1] 74.28[2]	*	.02	1 CX 838A-F; CX 839A-B 2 CX 18
Ethyl Du Pont	MLA 500 Special #1 Tetramix 50 S-1	May 1978 May 1978	77.45[1] 77.56[2]	**	.11	1 CX 480 2 CX 1113Z41
Ethyl Du Pont	MLA 500 Special #1 Tetramix 50 S-1	June 1978 June 1978	76.08[1] 76.30[2]	**	.22	1 CX 475 2 CX 1113Z43
Ethyl Du Pont	MLA 500 Special #1 Tetramix 50 S-1	July 1978 July 1978	74.71[1] 75.04[2]	74.71[3]	.33	1 CX 469 2 CX 1113Z45 3 CX 1113Z46
Ethyl Du Pont	MLA 500 Special #1 Tetramix 50 S-1	Sept. 1978 Sept. 1978	75.56[1] 75.58[2]	75.56[3]	.02	1 CX 462 2 CX 1062A-B 3 CX 1113Z48
Du Pont Ethyl*	Tetramix 50 S-1 MLA 500 Special #1	Feb. 1979 Feb. 1979	81.56[1] 81.64[2]	*	.08	1 CX 1113Z54 2 CX 389

* There is no documented evidence of an Ethyl roll back although according to record evidence it was their practice to match rivals' prices. (CX 1953Z86; 177).

** There is no documented evidence of a roll back although according to Du Pont witnesses it was their practice to match rivals' prices. (Park, Tr. 1828-29).

APPENDIX K(v)

Company	Mix	Approximate Date of Price Change	Initial (Differing) Prices	Roll Back Price	Difference in cents/pound	Notes
Du Pont*	Tetramix 50 S-1	March 1979	83.27[1]			1 CX 1113Z60
Ethyl	MLA 500 Special #1	March 1979	83.35[2]	No evidence	.08	2 CX 433
Du Pont	Tetramix 50 S-1	April 1979	85.00[1]			1 CX 1113Z62
Ethyl	MLA 500 Special #1	April 1979	85.06[2]	No evidence	.06	2 CX 390

* Ethyl priced above the initial Du Pont announcement because of an intervening pig lead increase. Du Pont rescinded its earlier announcement (CX 1113Z58) and moved to match the higher Ethyl price on all but the special mix.

Opinion of the Commission

By Pertschuk, *Commissioner:*

This case involves the four U.S. companies which produce "lead antiknock compounds," the product added to gasoline to reduce engine-knocking. In brief, the complaint alleges that the four companies have independently followed certain practices over an extended period[1] which have had the effect of reducing competition in the industry by "facilitating" uniform, [2] supracompetitive prices. Unlike a case based upon Section 1 of the Sherman Act, which requires a finding of an agreement, the theory of this case is that the practices pursued independently and in parallel fashion by the four respondents, nevertheless significantly reduced competition and violated the Federal Trade Commission Act.

The complaint challenges four specific types of practices—use of advance notice of price change clauses in sales contracts and providing notice in excess of 30 days, providing advance notice of price changes to the press and others, use of "most favored nation" price clauses in sales contracts, and use of uniform delivered pricing. The complaint alleges use of these practices were unfair methods of competition and unfair acts or practices by reducing price competition and consequently contributing substantially to uniform, supracompetitive prices. After a trial on the merits, the administrative law judge found that the respondents had engaged in these practices and that, under the circumstances of this industry, the practices were unlawful under Section 5 as unfair methods of competition and unfair acts or practices. He entered an order which barred use of advance notice of price increases, limited announcements of price changes to the press and others, permanently prohibited use of most favored nations clauses for Ethyl and DuPont, and prohibited uniform delivered pricing.

For the reasons discussed below, we affirm certain of the ALJ's findings, including a finding of liability for all four respondents for use of uniform delivered pricing. We also affirm [3] the finding that Ethyl and DuPont violated Section 5 by regularly providing notice of price increases in advance of contractual requirements and using most favored nation clauses. Our finding of liability is based on the charge of unfair methods of competition only; we decline to adopt the conclusion that these practices are also "unfair acts or practices" within the meaning of Section 5. We also reject the finding that press announcements violated Section 5. The order we enter today is differ-

[1] The ALJ generally focused on a core period of January 1974 to May 1979 for purposes of analysis. This period corresponds to the termination of price controls to the issuance of complaint. It is a reasonable period for analysis and is not arbitrary in duration or beginning and ending dates. We refer to this time period below as the "relevant period."

ent in several key respects from the order adopted by the ALJ, including the absence of a flat ban on advance price announcements, the absence of any time limitation on press announcements after price changes are made effective, the absence of any order provision applicable to Nalco or PPG, and a narrower provision concerning use of uniform delivered pricing.

1. *Legal Theory*

We are met in this case with two principal legal questions: 1) can practices followed by individual companies violate Section 5 by facilitating interdependent behavior, such as increasing prices and restricting output, absent collusion; and 2) if certain "facilitating practices" can violate Section 5, what legal standard should be used in assessing whether particular practices are unlawful?

The complaint in this matter alleges that four practices followed by respondents constituted unfair methods of competition and unfair acts and practices in violation of Section 5: 1) providing advance notice of list price changes to customers; [4] 2) issuance of press releases on these price changes; 3) use of uniform delivered prices; and 4) use of most favored nations clauses.[2] The complaint did not allege that the respondents had agreed among themselves to use any of these practices. The theory of the complaint, rather, is that use of these practices by each respondent, even though acting individually, "facilitated" anticompetitive market performance by communicating price information, reducing uncertainty on the part of respondents about current and future prices, and creating a mechanism for rapidly equating prices after a price change by one of the companies. The result of the practices, it is alleged, was a substantially higher degree of price uniformity at supracompetitive levels than would have been likely to occur in the absence of these practices.

1.1 *The Lack of an Agreement*

Respondents' primary argument that the complaint does not allege unlawful conduct is that a violation of Section 5 for conduct which is not predatory or monopolistic requires a finding of an agreement. In support of their argument respondents point to the court of appeals opinion in *Boise Cascade*,[3] in addition to other court and Commission opinions and statements about the reach of Section 5. In assessing respondents' legal contentions, it is useful to review the history of cases suggesting that [5] conduct by competitors could violate Section 5 even though no agreement was found.[4]

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[2] PPG was not charged with use of a most favored nations clause.

[3] *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

[4] Prior Commission cases dealing with similar fact situations, typically base point or other pricing schemes, have been analyzed as possible unfair methods of competition. Some practices which constitute unfair methods of

(footnote cont'd)

In *Cement Institute*[5] the respondents were charged with acting in concert to restrict competition through use of a base point pricing system. The Supreme Court found that an agreement had existed but in addition stated its decision "does not mean that existence of 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Federal Trade Commission Act."[6] The Court cited for that proposition *FTC v. Beech-Nut Packing Co.*[7] In *Beech-Nut* the Court had also found an agreement to have existed in the context of a vertical price-fixing scheme but in dictum said an agreement was not necessarily required for a violation.[8]

In *Triangle Conduit*[9] the same year a court of appeals found the respondents had agreed to a base point pricing [6] system. As an alternate holding, the court also found that the use by individual respondents of that system could constitute an unfair method of competition.[10]

After these two cases were decided, a Senate subcommittee, skeptical of the "individual actor" theory, submitted questions to the Commission about its validity. A majority of the Commissioners agreed that *Cement Institute* and *Triangle Conduit* applied only to "conspiracy situations."[11] The subcommittee concluded that "the Commission appears to have written off the theory that 'conscious parallel action,' absent conspiracy, constitutes an unfair method of competition."[12] [7]

The next Commission case to allege a violation based on interdependent conduct alone was *Boise Cascade*.[13] In *Boise* the Commission alleged that plywood manufacturers, accounting for about 50% of southern production of plywood sheathing had, acting individually, adopted a freight pricing scheme which resulted in anticompetitive

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competition have also been held to be unfair practices. *American Medical Association v. FTC*, 94 F.T.C. 701, 1010 (1979), *enforced*, 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by equally divided Court*, 102 S.Ct. 1744 (1982). The complaint allegation of unfair practices is discussed separately below.

[5] *FTC v. Cement Institute*, 333 U.S. 683 (1948).

[6] *Id.* at 721, n. 19.

[7] 257 U.S. 441 (1922).

[8] *Id.* at 455.

[9] *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by equally divided court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949).

[10] *Id.* at 181.

[11] Interim Report on Study of Federal Trade Commission Pricing Policies, S. Doc. No. 27, 81st Cong., 1st Sess. 62–63 (1949).

[12] *Id.* at 62.

[13] *Boise Cascade Corp.*, 91 F.T.C. 1 (1978), *rev'd, Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980). The complaint in *Kellogg Co.*, FTC Docket No. 8883, (complaint dismissed without opinion, Jan. 15, 1982) [99 F.T.C. 8] alleged a shared monopoly theory under Section 5 of the FTC Act. At trial complaint counsel attempted to adduce evidence that respondents' conduct was exclusionary, resulting in higher barriers to entry to potential entrants. The alleged result was a market of a few dominant firms possessing monopoly power. Thus, while *Kellogg* was not a facilitating practice case, Commissioner Clanton, in a Separate Statement concurring in dismissal of the case, observed that Section 5 provided the Commission with authority to attack non-collusive behavior that "contributes to or enhances anticompetitive conduct, and which is without compelling business justification." (Clanton Statement at 1.) [99 F.T.C. 8 at 270] Commissioner Pertschuk also stated that the *Kellogg* complaint was not "an allegation of practices by individual companies which, under the circumstances of the industry, facilitate uniform pricing or other anticompetitive behavior." (Pertschuk Statement at 3.) [99 F.T.C. 8 at 281]

pricing behavior on the part of these firms. This pricing scheme, use of a West Coast freight factor for determining freight prices from southern shipping points, was alleged to have resulted in an "artificial" method of calculating freight prices, contributing to the manufacturers' pricing uniformity for Southern plywood, and thereby reducing price competition. The Commission concluded that conduct which did not constitute an agreement but which was anticompetitive could violate Section 5 even though it did not violate Section 1 of the Sherman Act:

> The Supreme Court has frequently acknowledged the Commission's authority to proscribe [8] anticompetitive conduct which may not fit within the confines of the Sherman Act, *e.g., FTC v. Brown Shoe Co.,* 384 U.S. 316 (1966); *FTC v. Motion Picture Advertising Serv. Co.,* 344 U.S. 392, 394–395 (1953); *FTC v. Cement Institute,* 333 U.S. 683, 689–93 (1948), and the Seventh Circuit has previously held that the concurrent although non-collusive adoption by competitors of an artificial method of pricing which restrains competition is unlawful [citing *Triangle Conduit*].[14]

The Commission's opinion in *Boise Cascade* was reversed by the Ninth Circuit Court of Appeals,[15] but not on the ground that an agreement was required to find a violation of Section 5 for parallel use of practices resulting in harm to competition. To be sure there is some language in the opinion which is ambiguous,[16] but the overall thrust of the opinion leaves little doubt that the court held merely that the Commission had not demonstrated adequate record proof that the challenged practices had actually harmed competition:

> As we concluded in part II, the weight of the caselaw, as well as the practices and statements of the Commission, establish the rule that the Commission must find *either collusion or actual effect* on competition to [9] make out a Section 5 violation for use of delivered pricing.[17] (emphasis added)

In addition to this statement, the court in *Boise* discussed at length the record evidence showing that the effect of the pricing practices was harmful to competition, contrasting their effect with other possible explanations of pricing practices. Finally, the *Boise* court pointed to a number of other factors in reversing the Commission, including the absence of expert testimony in support of the Commission's findings, the lack of buyer testimony objecting to the practices, and ambiguous profit data. This extensive discussion strongly suggests that

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[14] *Boise Cascade Corp.,* 91 F.T.C. at 102–103.

[15] *Boise Cascade Corp. v. FTC,* 637 F.2d 573 (9th Cir. 1980).

[16] At one point, the opinion states, "It is important to stress that the weight of the case law and the Commission's own policy statement make clear that we are looking for at least tacit agreement to use a formula which has the effect of fixing prices." *Id.* at 576. However, the use of the word "tacit" and the rest of the opinion indicate that the Court did not have in mind an "agreement" in the sense required by Section 1 of the Sherman Act.

[17] *Id.* at 582.

the conclusion that an agreement had not been proved was not dispositive. As we stated in our opinion in *Boise,* agreements to fix a portion of the price of products, as in the case of delivered pricing agreements, are *per se* unlawful,[18] while, in assessing individual use of delivered pricing we examined the record for anticompetive effects.[19] Although the court of appeals reversed the Commission's decision in *Boise,* because of an inadequate showing of adverse competitive effects, it did not undercut the essential holding that "individual actor" delivered pricing cases must be decided on the basis of a rule of reason analysis. In short, respondents' argument that the court of appeals in *Boise* found that an agreement was required under [10] Section 5 is incorrect, and this case is easily distinguishable from *Boise* on the basis of a stronger factual record.

This line of delivered pricing cases gives strong support to the proposition that the Commission need not find an agreement in order to find unlawful practices which have the same general *effect* as horizontal agreements. These cases stand for the proposition that practices that result in the same anticompetitive effects that the Sherman Act was intended to prevent, and that violate the basic legislative goals of the Act, violate Section 5.

As the Supreme Court stated in *Atlantic Refining Co. v. FTC,*[20]:

> When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.[21]

In *Atlantic Refining* the Commission had found unlawful an arrangement between a large oil company and a tire manufacturer in which the tire manufacturer paid commissions to the oil company for sales of its tires and other automobile accessories by the oil company's dealers. No overt tie was made by the oil company, requiring the dealer to buy particular tires as a condition for continued supplies of gasoline. Thus, the case did not come within the Sherman or Clayton Act. The reviewing courts upheld the Commission's finding of a violation of Section 5, [11] however, on the grounds that the practices violated the goals of the Sherman Act. The Supreme Court noted that "the effect of the plan was *as though* Atlantic had [entered into a conventional tying arrangement]."[22]

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[18] 91 F.T.C. at 100 (citing *U.S. v. Socony-Vacuum Oil,* 310 U.S. 150, 224 n.59 (1940)). *See also Plymouth Dealers Assoc. of Northern California v. U.S.,* 279 F.2d 1281 (9th Cir. 1960).

[19] *Id.* at 103.

[20] 381 U.S. 357 (1965).

[21] *Id.* at 369–70.

[22] *Id.* at 370. (emphasis in original) Other Commission findings based on similar factual situations and reasoning were also affirmed by the courts. *See FTC v. Texaco, Inc.,* 393 U.S. 223 (1968); *Shell Oil Co. v. FTC,* 360 F.2d 470 (5th Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967). Similarly, in *Grand Union v. FTC,* 300 F.2d (2d Cir. 1962), the Commission had found a retail food chain had violated Section 5 by inducing discriminatory promotional allow-

(footnote cont'd)

Section 5 has, of course, been applied to prohibit individual practices which constitute monopolization or attempts [12] to monopolize under the Sherman Act.[23] In addition, however, the FTC has proceeded against single-actor conduct which is unfair competitive behavior but which falls short of an attempt to monopolize under Section 2 of the Sherman Act.[24]

These cases illustrate that Section 5 was not intended to be subject to the same limitations as the Sherman Act and the Clayton Act when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by those two Acts and when prohibiting such practices is not inconsistent with any other legislative goal of the antitrust laws. This interpretation of Section 5 is quite consistent with the legislative history at the time of enactment [13] and subsequent historical scholarly analysis.[25] It is also endorsed by most current antitrust scholars.[26]

Professors Areeda and Turner agree that most authority supports the proposition that Section 5 extends beyond the Sherman and Clay-

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ances from a seller. Since Section 2(d) of the Clayton Act prohibits only the *granting* of such allowances, and Section 2(f) applies only to inducing discriminatory prices, the practice fell outside the letter of the statute. Nevertheless, the Commission was upheld because it had applied Section 5 to advance the basic policy of the Clayton Act.

> Nor can we accept the notion the Commission is here legislating a 'new antitrust prohibition.' The practice itself is clearly proscribed by §2(d) . . . The Commission is not upsetting specific Congressional policies; the proceedings did not 'circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.' No economic activity, once lawful, had been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from the technical confines of §2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent abuse of *buying* power. *Id.* at 98 (emphasis in original; citations omitted).

Commission findings based on similar fact situations and reasoning have also been upheld. *See, e.g., Alterman Foods, Inc. v. FTC,* 497 F.2d 993 (5th Cir. 1974); *FTC v. J. Weingarten, Inc.,* 336 F.2d 687 (5th Cir. 1964), *cert. denied,* 380 U.S. 908 (1965); *R.H. Macy & Co. v. FTC,* 326 F.2d 445 (2d Cir. 1964); *Giant Food, Inc. v. FTC,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963).

[23] *Borden, Inc. v. FTC,* 1982–1 Trade Cas. ¶64,558 (6th Cir. 1982) [674 F.2d 498 (1982)]; *DuPont de Nemours & Co.,* 96 F.T.C. 653 (1980) (complaint dismissed).

[24] These include early unfair methods of competition cases which amount to challenges of deceptive advertising and which also could be brought under the Section 5 authority to prohibit "unfair or deceptive acts or practices." *FTC v. R.F. Keppel & Bro.,* 291 U.S. 304 (1934); *FTC v. Balme,* 23 F.2d 615 (2nd Cir. 1928). However, other Commission cases are aimed at other unfair competitive behavior, *e.g., S & S Pharmaceutical Co.,* 72 F.T.C. 765 (1967) (forcing products upon retailers); as well as conduct which "may warrant the hyperbolic description of 'predatory and vicious.' " M. Handler and R. Steven, "Attempts to Monopolize and No-Fault Monopolization," 129 U. Penn.L.Rev. 1, 177 (Nov. 1980) citing, *e.g., Washington Crab Ass'n,* 66 F.T.C. 45 (1964) (threats of physical violence).

[25] *See* G. Henderson, *The Federal Trade Commission* 27 (1924); Rublee, "The Original Plan and Early History of the Federal Trade Commission," 11 Acad. Pol. Sci. Proc. 666 (1926); Baker & Baum, "Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition," 7 Villanova L.Rev. 517 (1962).

[26] *See, e.g.,* Sullivan, *Antitrust* 364 (1977). "[T]he FTC can condemn under Section 5 practices which violate the Sherman Act or the Clayton Act . . . and beyond this, may condemn under that section conduct which has purposes or effects similar to practices which violate either of those acts, or practices which have incipient tendencies to violate either of those acts." [citations omitted] *See also* J. Von Kalinowski, *Antitrust Laws and Trade Regulation* Section 6.02[2] (1982). "The Federal Trade Commission Act from its inception has been viewed as 'supplemental' to the antitrust laws. Although the Section 5 ban on unfair methods of competition extends beyond activities prohibited by the antitrust laws, the Supreme Court has stated that 'minimally that section registers violations of the Clayton and Sherman Acts.' *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 609, 73 S.Ct. 872, 97 L. Ed. 1277 (1953). . . . One basic purpose of Section 5 is to strike at the same evils addressed by the antitrust laws."

ton Acts.[27] However, they argue that "the spirit and letter of the antitrust laws are identical, and that insofar as sound policy condemns or permits given conduct under the Sherman or Clayton Acts, then sound policy requires the same results under the Federal Trade Commission Act."[28] While their analytical approach may be different, they believe that [14] Section 5, even if it is interpreted consistently with the Sherman Act, can reach the type of practices challenged here:

> . . . [T]he "conspiracy" prohibitions of Sections 1 and 2 can be extended to many forms of parallel restrictive or exclusionary conduct, obviating the need to rely on a charge that each actor has individually "monopolized" in violation of Section 2. No serious practical or logical problems are encountered in *enjoining individual oligopolists from quoting delivered prices only,* from purchasing "distress" output from competitors, or from purchasing unneeded supplies. To be sure, such injunctions run beyond a simple prohibition against "agreeing" on such matters, because more specific direction is necessary to assure termination of the illegal action, but they are as readily enforceable. (emphasis added)[29]

It is clear, however, that an application of Section 5 based upon the basic objectives of the Sherman or Clayton Act should be based upon a careful review of the factual circumstances, including if necessary an examination of the structure and performance of the market involved, to insure there is persuasive evidence showing that the effects of the challenged practices are closely analogous to the anticompetitive effects that these Acts were intended to prevent.

Our reaffirmation that Section 5 extends to prohibit conduct which is not reached by the Sherman or Clayton Act is not to say that Section 5 prohibits any conduct which leads to such an undesired result (*e.g.,* sustained supracompetitive prices), but only conduct that leads to such a result *and* violates the basic legislative goals of the Sherman Act. For example, Section 5 would not prohibit monopoly pricing alone, but it does prohibit [15] conduct which excludes competitors unfairly, which in turn is likely to lead to monopoly pricing. To prohibit monopoly pricing, however, would inevitably lead to unworkable price regulation rather than specific proscriptions regarding anticompetitive practices.

Similarly, Section 5 should not prohibit oligopolistic pricing *alone,* even supracompetitive parallel prices, in the absence of specific conduct which promotes such a result. To do so would conflict with basic legislative goals of the antitrust laws by forcing an examination of the reasonableness of prices and by deterring firms from setting profit-

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[27] "It is now commonly said that Federal Trade Commission Act is not confined by the prohibitions of the Sherman Act or the Clayton Act." P. Areeda and P. Turner, II Antitrust Law 20 (1978).

[28] *Id.*

[29] *Id.,* Vol. III at 362.

maximizing prices because of the fear of antitrust liability. On the other hand, no legislative goal of the antitrust laws is advanced by allowing facilitating practices which promote uniform, supracompetitive prices in a tight oligopoly and which offer no countervailing procompetitive justifications.

Here we are faced with allegations that specific conduct followed by individual respondents, regularly and over a prolonged time period, had the effect of substantially reducing competition by facilitating uniform, supracompetitive pricing. While it may be true that such individual conduct could not be reached under Section 1 of the Sherman Act because of the express terms of the statute, we reject respondents' arguments that Congress intended that an agreement be an essential element of a Section 5 violation. It is quite clear that Congress rejected the specific limitations of the Sherman Act in establishing the [16] standard for a Section 5 violation.[30] Respondents have not argued, and could not persuasively, that anticompetitive consequences of uniform, supracompetitive pricing are impossible or are inevitably insignificant unless there is agreement among competitors. We understand respondents to say rather that, even if certain practices harm competition and there is no procompetitive justification for them, the Commission is flatly prohibited from prohibiting them because of a Congressional determination that an agreement is an indispensable element of a violation of Section 5. We reject this contention. The scope of Section 5 is limited, not by the necessity of showing a combination, but rather by the policy of the Sherman Act to preserve competition. Consequently, the legislative history of Section 5 as well as the Sherman and Clayton Acts and subsequent interpretations confirm that Section 5 should be applied to promote the fundamental legislative goals of the Sherman Act, but is not bound by its strict limitations.

In particular, the allegations in this case involve practices which are claimed to have the same results as those condemned in *U.S. v. Container Corp.*[31] In *Container Corp.*, the appellees, controlling 90% of the market, were charged with agreeing to exchange current price information in a market with [17] relatively inelastic demand and a fungible product. While no agreement to fix prices was shown (though there was an agreement to exchange price information), the Court found that "[t]he inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chill-

[30] The "broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). *See also Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 369–70 (1965).

[31] 393 U.S. 533 (1969).

ing the vigor of price competition."[32] The dissenting Justices did not believe there was sufficient evidence in the record to show anticompetitive effects and, consequently, disagreed with what they felt was, in effect, a *per se* condemnation of the price exchange agreement by the majority. Whatever the analysis applied by the majority in *Container Corp.*, we understand the case, at least, to hold that agreements to exchange prices which have the likely effect of stabilizing prices, and which offer no offsetting procompetitive justifications, violate the Sherman Act.

Here we must examine practices closely analogous to those reviewed in *Container Corp.*, and which are alleged to have closely analogous effects on the behavior of the market. Thus, the theory as to how competition may be harmed and the consistency with the legislative goals of the Sherman Act bring the theory of this complaint within the policy of the Act, even though no agreement is alleged.

Similarly, this complaint alleges conducts and anticompetitive effects which are closely analogous to pricing [18] practices which have been found to violate Section 5 and Section 1 of the Sherman Act.[33] In these cases, (with the exceptions noted above) agreements among competitors to employ base point pricing schemes were found to have violated Section 5 by tending to increase uniformity in pricing, though there were not agreements to fix prices themselves. The competitive evil prohibited by these cases was the tendency for base point pricing schemes to result in uniform prices. Here we are faced with allegations that the uniform delivered pricing, together with the other challenged practices, followed by each respondent resulted in precisely the same anticompetitive effects of agreements to enter into base point pricing schemes with a closely analogous process of price-matching.

Antitrust scholars have advocated prohibition of conduct by competitors which result in anticompetitive pricing even though proof of "conventional" agreements might be absent. For example, Professor Posner advocates extensive use of economic evidence in price-fixing cases and would find collusion based upon tacit understandings of the mutual gain from coordinated behavior.[34] He concludes, "Economic theory suggests that basing-point systems should be enjoined under Section 1 of the Sherman Act regardless of whether there is proof of actual [19] agreement, because the plain purpose of such systems is

[32] *Id.* at 337.

[33] *See, e.g., FTC v. Cement Institute, supra; Triangle Conduit & Cable Co., Inc. v. FTC, supra; Sugar Institute, Inc. v. U.S.*, 297 U.S. 553 (1936).

[34] R. Posner, *Antitrust: Cases, Economic Notes and Other Materials*, 128–137 (1974).

to foster monopoly pricing."[35] Elsewhere he states:

> The purpose of basing-point pricing is to facilitate collusion by simplifying the pricing of colluding firms. . . . It is plainly inconsistent with competition, which would quickly eliminate any phantom freight charges. With one exception, [citing *Triangle Conduit, supra*] in all of the cases in which basing-point pricing schemes have been challenged as a violation of the Sherman Act, there has been evidence that the sellers had agreed to set up a basing-point system. . . . I regard such evidence as unnecessary to establish a violation of the Sherman Act.[36]

Professor Sullivan also believes that caselaw supports the conclusion that "interdependent though non-collusive decisions to follow a basing point system (which facilitates price leadership) violate Section 5 of the FTC Act [citations omitted] and, implicitly, Section 1 of the Sherman Act."[37] As discussed above, Professors Areeda and Turner believe that the definition of "conspiracy" reaches the individual oligopolists' use of delivered prices, a proposition which would result in prohibiting these practices under the Sherman Act as well as Section 5.

We refer to these analyses by antitrust scholars because they illustrate the close relationship between viewing interdependent pricing practices as conspiracies under the Sherman Act and as practices which facilitate uniform pricing but which are not characterized as a conspiracy. Under either view **[20]** the competitive harm is conduct which is substantially different from the competitive model because prices are established by non-market forces at supracompetitive levels.

In short, the legal theory of the complaint is supported by the prior case law dealing with Commission challenges to base point pricing schemes, the legislative history of Section 5, and the Supreme Court's repeated determinations that Section 5 extends to conduct which results in the same anticompetitive effects that the Sherman Act was designed to prevent and violates a basic legislative goal of the Act—preventing competitors from reducing competition by pursuing price uniformity at supracompetitive levels. Each of these lines of authority supports the proposition that Section 5 prohibits conduct by individual firms which is shown to result in substantial harm to competition by promoting price uniformity at supracompetitive levels, restrictions in output below those which would be achieved in an efficiently performing industry, or similar anticompetitive results.

Respondents argue that the Commission would be changing "long-standing" legal standards for assessing the practices challenged here

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[35] *Id.* at 135.

[36] R. Posner, *Antitrust Law: An Economic Perspective* 70–71 (1976).

[37] L. Sullivan, *Antitrust Law* 357 (1977); *See also id.* at 364.

if we found them to be unlawful. In fact, as we have discussed, the legal standards for Section 5 encompass the theory of the complaint and no Commission case has upheld the practices challenged here. As for the statements of various Commissioners in response to the Senate inquiry of 1949, the Commission must be free to modify over time its assessment of the unlawfulness of certain practices under Section 5. Otherwise, [21] the Commission would be precluded from considering relevant legal, economic, and other developments which add to the body of knowledge and reasoning upon which the Commission must rely.[38] In any event, the Commission has previously departed from the conclusions of the Senate study in its findings in *Boise Cascade, supra.* Moreover, respondents are subject in this proceeding only to an order to stop practices found unlawful, not to punitive sanctions. Consequently, an interpretation of the law which they feel departs from prior Commission precedent is not unfairly prejudicial.

1.2 *Identifying Anticompetitive Facilitating Practices*

A more difficult legal question is identifying which practices, engaged in by firms acting individually, adversely affect competition so as to violate Section 5. Certainly such practices should be assessed under a rule of reason, that is, the Commission should examine the particular market conditions in which the practices occurred, the ways in which the practices reduced or distorted the competitive behavior of the market, the purposes of the firms in following the practices, and any procompetitive effects of the practices.

In general, practices such as those at issue here—which are alleged to promote price uniformity by providing a vehicle for communicating current price information, providing a relatively high degree of certainty about competitors' pricing [22] behavior, and facilitating pricing coordination—are likely to have a substantial effect only under certain structural conditions. Although commentators vary in the way they characterize certain structural factors and in including less significant factors, economic literature is generally consistent as to the principal structural factors which make collusion or interdependent behavior more likely.[39] Professor Posner lists the following factors as indicating an industry is collusion prone: market concentrated on the selling side, no fringe of small sellers, inelastic demand, entry takes a long time, many customers, standard product, principal firms sell at the same level of distribution, price competition is more impor-

[38] *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264–267 (1975); K. Davis, *Administrative Law of the Seventies* Sections 17.07–3, 17.07–4 (1976).

[39] Both complaint counsel and respondents cite economic literature discussing the structural conditions necessary for "facilitating practices" to have a significant effect on market behavior. *See, e.g.*, F. Scherer, *Industrial Market Structure and Economic Performance* 171–72 (2d. ed. 1980); G. Stigler, *The Organization of Industry* 39–45 (1968); J. Bain, *Industrial Organization* (2d. ed. 1968); D. O'Brien and D. Swann, *Information Agreements, Competition and Efficiency* 123–24 (1969).

tant than other forms of competition, high ratio of fixed to variable costs, demand static or declining, sealed bidding, and record of price-fixing or related violations.[40] Professor Areeda lists similar factors and includes direct and indirect verbal communication,[41] nonverbal communication through known, repeated, and standardized transactions, absence of frequent [23] secret transactions, customary pricing patterns, similar cost structures, small number of firms, and the absence of close product substitutes.[42]

Expert testimony from both sides was generally consistent as to views about structural factors which tend to result in less competitive firm behavior. Dr. Hay mentioned high concentration, homogeneous products, and inelastic demand, in addition to more specific testimony absent the effect of information exchange and other challenged practices in this case. Dr. Mann listed four principal structural characteristics as indicative of poor competitive performance, including a small number of firms, homogeneous products, barriers to entry and inelastic demand. He also gave some less specific testimony about "environmental" factors in addition to these four. Dr. Carlton listed structural factors which he believed led to the performance in this industry, including a small number of producers; the two large producers with similar production processes, demand and cost structures; a homogeneous product; a rapid flow of information; inelastic demand; additional entry is unlikely; and large, sophisticated buyers.[43]

In addition to economic literature and expert testimony, we also can look to recent statements by the Commission and the [24] Department of Justice concerning merger analysis but which rely in part upon identifying markets where collusion or interdependent pricing is more likely.[44] While these statements are directed specifically to merger analysis, they are useful for our purposes as well. The Justice Guidelines list a number of key factors including high market concentration,[45] barriers to entry, homogeneous products, absence of close product substitutes, similarities in products and location where competition occurs, and extensive flow of information about transac-

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[40] R. Posner, *Antitrust Law: An Economic Perspective* 55–61 (1976).

[41] Including public statements by firm spokesmen.

[42] P. Areeda, *Antitrust Analysis* ¶262 (1981).

[43] Dr. Carlton and respondents generally argue that any poor performance in this industry is the result of structure alone and is unaffected by the challenged practices. We discuss this point below. Here, our concern is to identify structural factors which make coordinated or collusive pricing more likely.

[44] U.S. Department of Justice Merger Guidelines ("Justice Guidelines") (June 14, 1982); FTC Statement Concerning Horizontal Mergers ("Commission Statement") (June 14, 1982), both reprinted in CCH Report No. 546 (June 16, 1982); subsequent citations are to CCH Report.

[45] We have relied in the past upon a four firm concentration of approximately 50% as indicative of a moderately concentrated market. *See, e.g., Hueblein, Inc.,* 96 F.T.C. 385, 577 (1980). Another useful measure of market concentration is the Herfindahl-Hirschman Index. Using this index, the Department of Justice views a market as moderately concentrated if the Index exceeds 1000 and highly concentrated if it exceeds 1800. Justice Guidelines, 26–30.

tions.[46] The Commission's statement pointed to similar factors which included, in addition to high concentration and entry barriers, homogeneity of products, small number of sellers, and similarity of producers' costs.[47]

On the basis of these analyses, about which there is some consensus, we can identify major factors indicating a likelihood [25] of interdependent pricing along with a series of secondary factors. We would expect an effect only in markets dominated by relatively few sellers and, hence, markets in which concentration is high. Only under these conditions could a high degree of pricing coordination by competitors, absent an agreement, be achieved. In addition, we would not expect such practices to have a significant effect unless barriers to entry deterred potential entrants from "competing away" excess profits earned by firms with supracompetitive prices. It is much more likely that pricing coordination could be achieved in markets with homogeneous products. Competition among producers of non-homogeneous products, with special brand features or characteristics, would tend to undercut price coordination by complicating the process of "price matching" by competitors.

Additional factors which make it more likely that facilitating practices would have anticompetitive effect include a relatively inelastic demand for the product and declining or flat sales trends. Inelastic demand makes supracompetive pricing possible and profitable since a restriction in output will result in prices above marginal cost and excess profits. Declining or flat trends in sales may be significant by leading to excess capacity and the threat of declining prices and profits. In such circumstances, sellers have a stronger incentive to maintain prices above marginal cost and to avoid price reductions. In addition, flat sales trends [26] suggest new entry is unlikely. An additional structural consideration is similarity of cost structures, particularly for the dominant firms.

Evidence of actual market performance may corroborate these structural factors or may suggest that the market is behaving competitively. Indicators of a poorly performing market would include sustained profits above levels obtained in other comparable industries, excess capacity or other indications of output reduced below optimum levels, stability of market shares, the absence of significant entry in the face of excess prices or rising demand, prior examples of collusion among industry members, and stable or increasing prices in

[46] Justice Guidelines, 33–36.

[47] Commission Statement at 80. Other factors mentioned by the Commission, *id.*, including a history of price-fixing and stability of market shares, are also associated with an inference of some likelihood of future collusive or interdependent conduct based on past conduct.

the face of falling demand.[48]

An examination of these factors may shed much light on whether the market structure is a reliable indicator of the degree to which pricing coordination could be affected by certain facilitating practices. If, after an examination of market structure factors and the actual performance of the market, the [27] available evidence indicates that the market is unlikely to be affected by such practices, then the inquiry can be ended. If, however, evidence of market structure and performance indicates the practices could promote price uniformity, we must examine evidence of the actual effect of these practices on market performance.[49] This examination should include evaluating any reliable evidence of how the practices promoted price uniformity and whether price changes could be explained on the basis of other considerations. Any evidence of market behavior without such practices would be relevant, as well as the history of the practices. In addition, evidence of the purpose for adopting such practices would be relevant, primarily because evidence of purpose can be helpful in explaining likely effects.

Finally, in addition to examining the effect of the challenged practices on price uniformity or other indicators of market performance, the Commission should examine any possible procompetitive effects of the practices. As is argued in this matter, the practices may be justified on the grounds that they lead to more competitive market performance, *e.g.*, by promoting [28] price comparisons or by greatly reducing the complexity of calculating prices. In this regard, the Commission should examine the history of the practices, the reasons for their adoption, and buyer testimony about the value of the practices.

1.3 *Summary of the Legal Standard for Facilitating Practices which are Unfair Methods of Competition*

Section 5 prohibits practices by individual firms which can be shown to have a significant adverse effect on competition by promoting price uniformity at supracompetitive levels, although this result

[48] We do not discuss at length the basis for identifying these factors as associated with poor market performance because they are more generally recognized in Commission and court cases. The Justice Guidelines also discuss indicators of poor market performance, including stable market shares, declining combined market shares of the leading firms in recent years, and profits of the leading firms exceeding comparable firms. Justice Guidelines at 38–39. Both the Commission statement, at 80, and the Justice Guidelines, at 37, mention prior collusion as suggesting future collusion is more likely. *See also* J. Bain, "Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence," 40 Am. Econ. Rev. 35, 37–38 (1950), citing high profits, scale of firms outside the optimum range, considerable excess capacity, excessive selling costs, and lags in technical change.

[49] It can be argued, as respondents do in this case, that a market can be so poorly structured, from a competitive standpoint, that the likely effect of practices which might promote price coordination is negligible. Such an argument depends upon the assumption that firms in extremely concentrated markets, *e.g.*, a duopoly dominated by a single firm, are likely to engage in pricing behavior that, though certainly not competitive in the traditional sense, is a result of structure alone. We are as reluctant to assume that this scenario represents the norm as we are to assume without further inquiry that practices such as those examined here usually contribute to or facilitate anticompetitive behavior. Rather, this issue should be explored in the context of examining evidence of actual effects of the challenged practices.

is accomplished without evidence of an explicit agreement. However, unilateral practices which affect price uniformity are suspect only when they occur in a market which is conducive to price coordination, where the effects on competition are clearly discernible and where no mitigating circumstances exist sufficient to offset the harmful effects of the practices. Therefore, evidence of such practices will necessarily be analyzed using a rule of reason approach.

Structural factors which suggest a market conducive to price coordination include high concentration, a small number of dominant firms, inelastic demand, homogeneous products and significant barriers to entry. (*See* discussion *supra* at pp. 22–26.) However, actual market performance must also be examined to determine whether historical evidence will corroborate or undercut tentative conclusions reached by examination of the market's structural factors. (*See* discussion *supra* at pp. 27–28.) Finally, evidence of the actual effect of the facilitating practices is a necessary element prior to any finding of liability. It is in this context that any **[29]** procompetitive business factors, offered in the way of a defense or justification of the challenge practices, are particularly relevant. (*See* discussion *supra* at 28–29.) Therefore, facilitating practices by individual firms will be found to violate Section 5 as unfair methods of competition only if the weight of the evidence shows that competition has been substantially lessened.

The Commission recognizes that application of Section 5 to practices that are not conspiratorial or monopolistic in nature will necessarily involve close questions of fact. This situation requires that we exercise our authority judiciously and find liability only where the conduct in question is clearly harmful to competition, so we do not chill or unnecessarily intrude into routine decisionmaking by business. It is for this reason that we must carefully articulate the market conditions conducive to anticompetitive conduct, examine actual market performance and establish a clear nexus between the challenged conduct and adverse competitive effects before invoking our authority in this regard.

1.4 *Unfair Practices*

As noted above, the complaint alleges that the practices of respondents were "unfair acts or practices" within the meaning of Section 5 as well as unfair methods of competition. The Commission has recently articulated its interpretation of its unfairness authority and the way in which the authority has been **[30]** exercised by the Commission and interpreted by the Courts.[50] In its December 1980 Statement the Commission indicated the criteria which had been applied in prior

[50] *See* Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, December 1980.

cases and the standards it would follow in subsequent analyses of practices alleged to be unfair.

In brief, the Statement indicated that consumer injury that was substantial, not reasonably avoidable, and not outweighed by offsetting benefits to competition or consumers would constitute the primary criterion for a finding of unfairness. In addition to an analysis of consumer injury, we stated that the Commission would also rely where possible upon established public policy in determining which practices were unfair and in helping to establish the presence of criteria necessary to establish consumer injury.

It is also clear that practices may be both unfair methods of competition as well as unfair practices within the meaning of Section 5. In *American Medical Association,* we found that restrictions on price advertising by a professional group were unfair by impeding the flow of information about the availability and price of medical services to consumers.[51] The restraints examined there were shown to harm competition substantially as [31] well as to harm consumers and to violate established public policy.[52]

In determining whether a practice, which is an unfair method of competition, is also an unfair act or practice, we are concerned primarily with its impact on consumers, principally individuals purchasing a product or service for their own consumption or investment. In *AMA,* for example, the challenged practices not only limited competition among physicians and thereby tended to undercut market incentives to lower prices and to increase the availability and quality of services, but also to deprive individuals of information essential to an informed choice. Here the record contains no analysis of its impact on individual consumers. In the absence of this analysis, we decline to accept the finding by the law judge that the practices were unfair.

2. *Market Structure and Performance*

The record evidence in this matter shows a market structure which is striking in its susceptibility to practices by individual firms which could promote price coordination. In addition, the historical performance of the market supports, rather than undercuts, this hypothesis.

2.1 *Market Structure*

There is no real dispute about the product or geographic market relevant for our analysis. The complaint's allegations [32] are confined to sales by domestic manufacturers of lead based antiknock compounds. These products are defined in the complaint as "additives

[51] *American Medical Association, supra,* 94 F.T.C. at 1010.

[52] *See, e.g., Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Council,* 425 U.S. 748 (1976).

to gasoline which increase its octane rating and which contain tetraethyl or tetramethyl lead." (Complaint, ¶1) Because of the absence of any dispute about relevant markets and because there is ample evidence in the record to support a finding that manufacturing of these products constitutes a relevant product market, and that the nation as a whole constitutes a relevant geographic market, we accept the assumption of the complaint that these markets are relevant for our analysis.

Since the early 1960's there have been only four sellers in this market. DuPont began selling lead-based antiknock compounds in 1948 and, until 1961, DuPont and Ethyl were the only firms in the market. PPG (then Houston Chemical Company) entered the market in 1961 and Nalco entered as a TML manufacturer in 1964. No foreign firm has ever sold these products in the U.S. (IDF 17–18)[53] **[33]**

The market is, of course, highly concentrated since four firms constitute 100% of the market. In addition, the market is dominated by the two largest firms—Ethyl and DuPont. During the period 1974 to 1979, Ethyl's share of the lead antiknock market averaged 34% and DuPont's share averaged 36%. PPG's average share during this period was 17.5% and Nalco's was 12.5%. (IDF 46) Based on these average shares, the HHI Index exceeds 2900.

Barriers to entry are high in this market. In particular, government regulation of lead-based additives—limiting their use for environmental reasons—makes it unlikely that there will be future entrants. (IDF 50) The developments in government regulation have reduced demand and contributed to excess capacity in the industry. (IDF 43) Consistent with these developments, there have been no new entrants into this industry since 1964. The striking absence of non-entry for more than 15 years and the developments in government regulation establish that barriers to entry have been high during the relevant time period, even if capital costs of entry or technological barriers may have been insignificant. There was no significant evidence offered by respondents, in expert testimony or otherwise, that entry is likely, and there was expert testimony to the contrary. (*See* IDF 50, 143)

In general, the products which constitute this market are homogeneous. There are two basic lead antiknock compounds—tetraethyl

[53] The following abbreviations are used in this opinion: ID, Initial Decision; IDF, Initial Decision Finding; EAB, Ethyl Appeal Brief; DAB, DuPont Appeal Brief; CX, Complaint Counsel Exhibit; REX, Ethyl Exhibit; Tr., Transcript page. In our view, no evidence released in this opinion constitutes trade secrets or confidential commercial information within the meaning of Section 6 of the FTC Act. However, the ALJ placed a number of documents and portions of testimony in the *in camera* portion of the record without an extensive review of the need for confidential treatment. Such treatment is within the discretion of the ALJ, particularly in the case of a lengthy record, because of the need to expedite trial procedures. Continued *in camera* treatment of any portion of this record, however, will require a particularized showing of the need for confidentiality to be submitted to the Commission within 30 days of the issuance of this opinion.

lead ("TEL") and tetramethyl lead ("TML"). TEL was originally produced in the 1920's and TML was first made in [34] 1960. TEL and TML are usually sold as mixtures although some refiners use pure TEL. (IDF 7) In 1976 Ethyl estimated that TML constituted about 20% of antiknock production. (REX 127P) The prices at which TML and TEL have been sold have historically differed, but the differential has narrowed to a few cents. For example, on May 25, 1978, TEL was priced at 73.62¢/lb. and TML was priced at 76.14¢/lb. By July 5 of that year the differential had disappeared. The different compounds sold by each of the four respondents are homogeneous. (IDF 12) Almost all mixtures are standard among all the respondents. (IDF 9) There is testimony that less than 1% of the sales were non-standard mixes. (IDF 10; Tr. 820) On some occasions, special additives were included in the basic compounds, but these were limited and not significant enough to complicate the process of easily equating the product of one respondent with that of another for price comparison purposes.

An additional structural consideration is the elasticity of demand. Supracompetitive prices are more likely in markets where demand is relatively inelastic, so that producers can benefit from raising prices above competitive market levels. The expert testimony is consistent in supporting the view that the demand for antiknock compounds is inelastic. (Hay, Tr. 3921, 3998; Mann, Tr. 5429; Glassman, Tr. 6257; Markham, Tr. 6782–84, 6832; Carlton, Tr. 6960) A study by Ethyl in the mid-1970's corroborates this view. (IDF 42)

A final consideration is that the two dominant firms have similar cost structures. (Carlton, Tr. 6959, 7067–71) Large [35] sophisticated buyers may also be able to disrupt collusive or coordinated pricing by pressing for discounts or other disruptions in pricing practices. This industry is marked by the presence of many large buyers, many of whom did press for discounts. Thus this factor weighs against others pointing in the direction of a poorly competitive market structure, though inadequate to change the overall conclusion.

As discussed above, standardized transactions and the free flow of information about terms of transactions are viewed by some commentators as structural factors which contribute to coordinated pricing and resulting in poor market performance. The essential allegations in the complaint charge that the challenged practices reduced competition by improving the information flow regarding transactions and by facilitating easy and coordinated price-matching. Thus, we do not assume these factors contributed to poor market performance, but we examine in more detail below evidence of their actual effects.

2.2 *Market Performance*

In assessing the degree to which this market performs competitive-

ly, we look to several key factors, including profit levels, vigor of price competition, the degree to which prices exceed marginal cost, prolonged excess capacity in the face of supracompetitive prices, and the degree to which market shares shift depending upon price competition by one or more companies. In general all these factors point toward a poorly performing market. Respondents make two arguments in opposition [36] to this view: 1) despite other indicators of poor performance, there is significant price discounting; and 2) poor performance in this market is a result of market structure, not the challenged practices. We deal with these arguments below.

2.2.1 *Profit Levels*

Profit levels in this market are high compared to suitable benchmarks. Appendix J in the Initial Decision shows each respondent's profits for the relevant products for the years 1974 through 1979. As the Initial Decision describes (IDF 163), a comparison of these benchmarks with average return on net assets for all manufacturing and for chemicals shows a dramatically higher rate of return. For example, Ethyl's and DuPont's return exceeded 150% of any benchmark comparison in every year during the period. PPG's return exceeded 150% of the benchmarks for four of five years and substantially exceeded the average benchmark for the period. Nalco's return similarly exceeded 150% of the benchmarks except for one year when it was slightly less than 150% of one of the benchmarks used for comparison.

Corroborating these figures were characterizations by company executives of the high profitability of this industry. An Ethyl executive characterized the business in early 1975 as a "golden goose." (CX 212Q) PPG recognized that in 1978 and 1979 the antiknock business had "historically high returns." (IDF 161) In addition, respondents' internal documents prepared before the proceeding reflected relatively high profit levels. DuPont and Ethyl submitted profitability studies prepared for this proceeding which showed profit levels substantially below [37] those discussed above. However, a number of deficiencies in these studies were found by the ALJ. (IDF 166) We believe the weight of the evidence on the record on this point clearly supports a finding of relatively high profits, consistent with a conclusion of poor market performance.

2.2.2 *Prices in Excess of Marginal Cost*

All the expert economists testifying in this matter agreed that prices for these compounds exceed marginal cost. (IDF 144) While there was disagreement over the implications of this finding—in particular, respondents' experts attributed it to the poorly competitive market structure—we can rely on the finding that price exceeds mar-

ginal cost as additional evidence that the market is not performing competitively.[54]

2.2.3 *Excess Capacity*

All the respondents had significant excess capacity during the late 1970's. (IDF 38–41). While excess capacity alone may not indicate poor market performance, and in fact may suggest that an exercise of market power by one or more firms is less likely, sustained excess capacity in the face of supracompetitive profits and prices indicates an absence of competitive pricing behavior. In a competitively performing market where prices were above marginal cost, one or more firms would be expected to expand market share by engaging in price reductions, eventually eliminating excess capacity. [38]

2.2.4 *Shifting of Market Shares*

Stability of market shares provides an indication of the degree of price competition in the market. As both respondents' and complaint counsel's experts testified, violatility of market shares is evidence of aggressive competition by firms wishing to increase market share.[55] This view is consistent with conventional economic analysis of oligopolistic markets. Since a firm which engages in aggressive pricing will gain market share from higher priced rivals, the absence of market share changes is more consistent with parallel pricing and cartel-like behavior. Shifting of business among customers is not inconsistent with a market stabilized at supracompetitive prices. Shifts may occur because consumers have immediate needs that cannot be satisfied by traditional suppliers or they may shift some purchases in order to maintain multiple sources of supply, as the record indicates occurred here. (IDF 26) Also, in a market with an emphasis on service rather than price competition, such as that here, individual buyers will respond to changes in services offered. On the whole, however, the shifting of business by particular buyers is less significant than expanding market share by aggressive pricing by one or more firms.

While there was shifting among respondents of the shares of purchases of individual customers (IDF 49), the shares of the market held by the respondents since Nalco and PPG have entered [39] and established their presence have been relatively stable. (*See* Appendix C of the Initial Decision) Respondents point to changes in market shares over a longer time period than the relevant period which was the focus at trial—1974 to 1979. Consequently, respondents analysis includes the entry and growth of Nalco and PPG. In fact, however, PPG and Nalco's position since the early 1970's has been relatively stable.

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[54] *See* Hay, Tr. 3793–94, 3967–71.

[55] *See, e.g.,* Markham, Tr. 6874; Glassman, Tr. 6078–82.

The shares of all four firms have remained relatively stable despite significant excess capacity during the relevant period on the part of all four firms. These relatively stable shares tend to support, rather than contradict, a finding of poor competitive performance.[56]

2.2.5 *The Extent of Discounting*

The heart of this case is the need to properly analyze pricing behavior in the market for these products. Complaint counsel argue strongly that the pricing patterns observed during the relevant period, 1974 to 1979, show a highly "artificial" market, avoiding price competition by competitors' rapidly matching prices. Respondents contend that, although there is a high degree of uniformity and price leadership in list prices, there is extensive competition taking other forms. In [40] particular, respondents point to a substantial percentage of sales at prices discounted below list, non-price competition in the form of services provided by respondents, and competition in other contract terms, such as credit.

Before discussing respondents' contentions, it is useful to review the overall pricing patterns in the years 1974 to 1979. All the respondents published list prices for the products they sold.[57] After price controls were lifted in 1974, the first industry-wide price increase was announced in early February, 1974. (IDF 51) Appendix D of the Initial Decision shows the list price changes in antiknock compounds between February, 1974 and April 18, 1979, the last list price increase prior to issuance of the complaint. During this period, there were twenty-four price increases. In twenty of these cases, the new prices for each respondent were identical after the change and became effective the same day. In the other four cases, the new price lists were identical but the effective date varied by a day or two. (IDF 53–57)

We discuss further below the relationship between the price changes and the challenged practices, but, at this point, we are concerned with whether pricing patterns corroborate or conflict with the evidence showing the market did not perform competitively. While it is true that in a "perfect" market, prices for identical products tend to equality, the adjustment to new price levels typically requires some time period. In [41] addition, in a "perfect" market, price is set equal to marginal cost. Here it is clear that prices were above marginal cost; and the movement of list prices was based upon a high degree of price leadership. Consequently, price uniformity observed in this case is

[56] Moreover, we would not expect perfectly stable market shares even in a highly anticompetitive market environment. Dr. Markham, Ethyl's economic expert, conceded that the change in market shares during the relevant period was less than the cigarette industry's during the period 1928 to 1933. (Markham Tr., 6876–77). During this period industry members were convicted of criminal antitrust violations. *See American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946).

[57] Nalco did not sell TEL and PPG did not sell TML.

consistent with interdependent pricing in an oligopoly, rather than with uniform pricing predicted in a competitive market. In particular, supracompetitive pricing in an oligopoly is based principally on price leadership with eventual price stability at supracompetitive levels, often resulting in supracompetitive profits while competitive pricing results in price equilibrium which results in reasonable returns to sellers and prices and output at competitive levels.[58] Respondents in fact do not contend that the lead antiknock industry follows the competitive model, but that poor competitive performance stems from market structure alone, rather than the challenged practices.[59]

Other evidence is consistent with the proposition that persons familiar with the industry did not believe there was extensive price competition. An oil company executive wrote, "There has never been any price competition in the lead alkyl market." (IDF 149) He also testified, "we perhaps would have saved more money in the end if there had been price competition [42] of the type that exists in other chemical purchasing areas." (McCormick, Tr. 2646–47) An internal Ethyl memorandum quoted a buyer as saying:

> There is and never has been price competition in antiknocks. This business of either you or DuPont raising the price; the other coming up with a different price which the first company then meets is all a smoke screen. (IDF 149; CX 577B)

The firmness with which the industry resisted destabilizing the price structure is illustrated by Exxon's failure to obtain significant discounts despite its solicitation of bids during the relevant period and its promise of substantial additional volume. Exxon suggested various innovative pricing proposals to obtain discounts in 1975, 1976, 1977, and 1978. Examples suggest a fairly consistent pattern of respondents' replying with list prices, despite the possibility of substantial gains in business. (IDF 152) Texaco solicited discounts based on volume purchases. (Wilson, Tr. 3204; IDF 153) For example, in 1975 Texaco requested bids from each respondent, stating:

> Antiknock compounds have historically been priced identically by all of Texaco's suppliers. We are most concerned that there has been in effect, a fixed price which we assume is paid by all customers, without the normal volume discounts which exist in most markets. With these fixed prices, the only difference we see in our suppliers is the various services rendered by each. We would like to see these purchases handled on a more business-like competitive market basis, and plan, therefore, to place our future antiknock compound business basis [sic] the best volume discount and 'service value' offered by suppliers. (IDF 153)

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[58] For a discussion of pricing behavior associated with tight oligopolies, *see, e.g.*, Sullivan, *Antitrust* 333–343 (1977); Scherer, *Industrial Market Structure and Economic Performance* 151–168 (2d. ed. 1980); A. Phillips, *Market Structure, Organization, and Performance* 32–41 (1962).

[59] *See, e.g.*, DAB at 25; EAB at 33.

Despite the offer of substantial additional business and Ethyl's internal analysis showed the profitability of offering a [43] discount, it responded with a list price quotation. Each of the other companies responded with list prices as well. (IDF 153) Other examples of buyers' inability to obtain discounts from list price, even without services, were found by the ALJ. (See IDF 154–156) While PPG and Nalco did offer some discounts (discussed further below) Ethyl and DuPont were extremely reluctant to discount from list prices under any circumstances. This pattern is consistent with the hesitancy of price leaders in tight oligopolies to destabilize a supracompetitive structure by selective discounting.

Other comments by company officials reflect a perception on the part of respondents that the industry price structure was supracompetitive. A DuPont executive testified that by the mid-70's there was a fear that [the price structure] would tumble and that it "certainly had a potential for declining." (Tunis, Tr. 112) An internal Ethyl document showed concern about "maintaining a stable market for antiknocks." (CX 207D) These comments, in the context of a high profit industry with prices acknowledged by respondents' experts to be above marginal cost are consistent with a finding of poor competitive performance and supracompetitive pricing.

Respondents' contentions that non-price competition showed a vigorously competitive market are undercut by the widely accepted proposition that limitations on price competition spur non-price competition.[60] It is familiar economic theory that the more [44] complex and more hidden the form of competition, the more difficult is the achievement of coordinated, parallel behavior in an oligopoly.[61] As Mr. Hay, complaint counsel's expert testified, the furnishing of services was not inconsistent with diminished price competition. (Hay, Tr. 4143–4158, 4162–63) Similarly, competition in credit terms, shown only in a few instances in any event, is consistent with the hypothesis that elimination or severe reductions in price competition will tend to encourage competition to "spill over" into non-price terms of the transaction.[62]

As to sales at prices which were discounted from list, some 15–19% of industry sales were made at such a discount. (IDF 79) However, discount sales were rarely made by Ethyl and not at all by DuPont

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[60] *See* Stigler, *supra*, at 23–26. He agrees with the "common belief among economists that price competition is much more effective in increasing output and reducing profits than non-price competition . . ." *Id.* at 26. *See also*, Areeda, *supra*, at 272–273.

[61] *See* Stigler, *supra*, at 42; Scherer *supra*, at 191.

[62] The fact that non-price competition, or even discounting off list, occurs is not inconsistent with a finding that price competition has been unlawfully restrained. *U.S. v. Container Corp., supra*, 393 U.S. at 337; *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1137 (1976).

during the 1974–1979 period.[63] (IDF 58–60) PPG made about one-third of its sales between 1974 and 1979 at a discount. (IDF 64) These consisted entirely of sales to only three customers—[***] and PPG's competitors—Nalco and DuPont. Beginning in April 1980, PPG gave a small [45] discount off list to [***] (IDF 65) In 1979, about 58% of its sales were at a discount including co-producer sales. (IDF 66)

Despite the large share of PPG's sales made at a discount, these sales were limited to a very small number of customers out of the approximately 150 buyers in the market. In addition, PPG's market share remained relatively stable during the relevant period (*See* App. C of the initial decision). Since PPG's profits in lead antiknock compounds remained high during the relevant period, it is clear there was ample room for further discounting if PPG were intent on an aggressive attempt to expand its market share. PPG did have significant excess capacity in 1977 and 1978. (IDF 40) In contrast to any aggressive marketing strategy, PPG planners expressed concern that competition would increase "with possible pressure on the present stable prices." (CX 1928G) These factors indicate a careful, selective discounting policy, adequately restrained to avoid upsetting the supracompetive price level equilibrium prevailing in the market.

Nalco's discounting was more extensive than PPG's. During the relevant period, over 80% of its sales were made at a discount. (IDF 78) The ALJ found Nalco made discount sales throughout the relevant period to [***] Despite the fact that Nalco was the high cost producer, its profits remained higher than comparable industry benchmarks during the relevant period. (IDF 163) Nalco also had excess capacity during the [46] relevant period. (IDF 41) Nevertheless, Nalco's share did not change significantly during the relevant period.

In addition, most of Nalco's major customers receiving discounts had been favored since they assisted Nalco in entering the market in 1963. (IDF 139) We also note that Nalco and PPG were in a commercial relationship with at least one of the market leaders. DuPont purchased TML from Nalco, and PPG purchased TML from DuPont. (IDF 20) A partial dependence on DuPont or Ethyl by the two smaller companies would create an additional disincentive for aggressive discounting.

Ethyl and DuPont were generally aware of Nalco and PPG's pricing policies. Generally, the two market leaders believed they would act similarly and be less likely to discount while Nalco and PPG were more likely to do so. (IDF 139) DuPont's business assessment reports stated:

[63] The only sales below list made by Ethyl were to [***] viewed this discount as payment for [***] investment in a [***] (IDF 58)

DuPont and Ethyl have always competed in the domestic market primarily on the basis of service to the customer. Nalco has consistently priced their principal product, tetramethyl lead, below list to 5 major companies [***] whose purchase commitments enabled Nalco to enter the market in 1963 and whose purchases comprise more than 80% of Nalco's business. Nalco's service effort is minimal. Houston [PPG] also competes on the basis of services as well as below list sales to [***] and meeting of the Nalco discount to [***] (CX 923 H–I; RDX 135H)

PPG was aware of Nalco's discounting to a small number of major customers. (J.M. Robinson, Tr. 1142) Nalco was also aware of some of PPG's discount transactions. While efforts were made by PPG and Nalco to keep discount transactions confidential, customers assisted in revealing them to respondents. [47]

These findings show a clear pattern. The leading firms, DuPont and Ethyl, avoided discounting while the smaller firms engaged in it; and Nalco, the smallest of the four competitors, adopted a fairly consistent policy of selling below list. The available evidence indicates that Nalco's costs were higher, rather than lower, than its non-discounting major competitors. (IDF 32–37) Moreover, PPG and Nalco's discounts were generally known to Ethyl and DuPont but not to customers who did not buy at discount. We conclude that the overwhelming portion (approximately 80%, IDF 79) of sales in the industry were not sold at a discount, and that the two leading firms did not engage in any active price competition with each other. While the two smaller firms, particularly Nalco, engaged in discounting, off-list pricing was sufficiently restrained to preclude significant shifts in market shares or to force the two major firms to discount, even though they were charging above marginal costs and consistently earning supracompetitive profits.

3. *Evidence of the Effect of the Practices*

The review of market structure and performance provides a solid basis for concluding that the market was susceptible to the promotion of price uniformity at supracompetitive levels by the challenged practices. However, it is necessary to assess the evidence showing the actual effect of these practices on pricing patterns.

3.1 *Advance Notice of Price Increases*

All four respondents followed the practice of giving 30 days' advance notice of price changes. Typically, this practice [48] was promised to customers as a contract obligation. (IDF 107–111) Also, typically, either DuPont or Ethyl would initiate the price change. (*See* the summary of price changes in Appendix D to the Initial Decision). Since each company was generally obligated to give 30 days' notice of price changes to customers, uniformity with other competitors on the

same effective day required that the initiator of the price change give *more* than 30 days' notice. This "extra" notice—beyond that required by the contract—is precisely what occurred in the great majority of cases. By providing several days extra notice, the initiator of the price change allowed the other companies to make identical price changes effective on the same day in 20 of the 24 price increases during the relevant period. The companies stated that the extra notice was precisely for the purpose of allowing competitors time to respond. (McNally, Tr. 2129; CX 93A) Moreover, if the competition did not respond, Ethyl's internal documents show that its standard plan was to roll back the initial change. (CX 1953Z298) PPG executives acknowledged that its price changes were determined by the actions of Ethyl and DuPont in initiating price changes. (J.M. Robinson, Tr. 1033, Fremd, Tr. 1592–93; CX 1285A, 1286; IDF 182)

The effectiveness of this pattern of advance announcements of price increases is shown not only by the vast majority of times in which uniformity in price and effective date was achieved, but also by the few instances when the pattern was broken. On one occasion, in August 1977, Ethyl undercut DuPont's price increase by announcing a lower price (that is, a smaller [49] increase) and a different effective date. In that case, however, DuPont did not announce the price change sufficiently in advance of the 30 day waiting period to give competitors an opportunity to respond with the same price and effective date. On the four occasions when there were price increases and the effective date was not the same, the prices became uniform with effective dates that varied by only a day or two. On no occasion were there list price differences which were not quickly eliminated. Consequently, except for occasional short periods when respondents had to maintain their old price one or two days beyond the change made by others because of the waiting period, there was no competition in list prices.

The experts who testified in this matter disagreed about the effect that advance notice price information had on competition. Dr. Hay testified that advance announcements "make it possible for all those list price changes to go into effect on the same day—at the same time. That is to say, no one producer is out there in the marketplace with a higher price than his rivals." (Hay, Tr. 3812) Dr. Mann agreed that advance announcements conveyed information and that the advance nature of such information, the speed of the conveyance, and reduced uncertainty could inhibit price differences based on different views about what price sellers should charge. (Mann, Tr. 5644–46) He felt prohibiting such practices would have little effect, however, since producers would find another way to accomplish the same result. (Mann, Tr. 5648, 5639–41) Dr. Glassman testified that advance notice

does not reduce price [50] competition, that advance notice was common in other industries with no apparent correlation with industry concentration, and that advance notice may actually increase uncertainty. Dr. Carlton did not believe the challenged practices had any anticompetitive effect in this industry but did agree that improved flow of information could reduce price competition. He testified that anything that makes it more difficult to learn a rival's price makes it more difficult to have parallel behavior.

We conclude from reviewing the expert testimony in this matter that there is *general* agreement as to certain principles. Greater knowledge of competitor's prices may aid in price-matching, while, conversely, secrecy in discounting makes price-matching more difficult. Advance notice of price increases is one device for conveying price information to competitors but is not anticompetitive in all situations. It would be difficult to dispute these propositions. They are supported by accepted scholarly analysis.[64] There is disagreement among the experts, however, as to whether advance announcements had a significant effect in this industry, and indeed where this industry was not workably competitive.

As discussed above, we believe the evidence in the record clearly supports a conclusion that this industry did not engage in vigorous price competition, but instead was characterized by [51] highly uniform, supracompetitive prices with limited discounting in particular circumstances, and a pattern of lock-step price changes. As we discuss further below, we conclude the advance notice practices used by respondents in this industry facilitated price uniformity.

It is *not* the case that tight oligopolies with dominant firms inevitably result in the pricing pattern observed in this industry. An initiator of a price increase in such an industry does not guarantee himself a "grace period" to retract a price movement that others do not follow. The initiator must take some risk in announcing price increases and must calculate whether his temporarily higher prices may result in a loss of sales. Conversely, the initiator of a price decrease typically has no interest in others following. In a market with vigorous price competition, the initiator of a price decrease wants to prevent his rivals from learning immediately of his price movement, if possible, at least until he is able to gain additional volume. The likelihood of both these situations—the loss of sales by an initiator of a price increase who is not followed by his rivals or the gain in volume by a initiator of a price decrease who will not be immediately matched by

[64] *See, e.g.,* Areeda, *Antitrust Analysis* 274 (1981); Posner, *Antitrust Law: An Economic Perspective* 61 (1976); Stigler, *The Organization of Industry* 42–43 (1976); F.M. Scherer, *Industrial Market Structure and Economic Performance* 222–25 (2d ed. 1981); J. Bain, *Price Theory* 273–283 (1952).

his rivals—is greatly reduced by the advance notice pattern followed by the respondents.

By following a consistent practice over the relevant period adhered to by every industry member, the respondents have developed an effective way of signalling pricing intentions. The practice of conveying to a competitor what is, in effect, a price [52] "offer," then waiting for a response—while avoiding different list prices at any time—actually goes beyond the competitive effect in exchanging current price information condemned in *Container Corp.* In that case, the practices which reduced competition consisted of agreements to exchange current price information by firms representing almost all the market. Here firms representing *all* the market have not only developed a system for exchanging current price information but for communicating future information with the opportunity to announce future prices on a contingent basis. The result has been to make it as easy as possible—short of an agreement—to rapidly equalize prices at a particular level without the destabilizing influence of even limited periods where list prices differ.

The view of the companies' executives about the nature of pricing in their industry is instructive. A DuPont executive testified "the price structure certainly had a potential for declining." (Tunis, Tr. 112) Ethyl's internal documents reflect a concern about "maintaining a stable market for antiknocks."

> To restate earlier thinking, our concerns about market shrinkage relate to overcapacity and maintaining a stable market for antiknocks. It is our impression that in industry after industry, maintenance of selling prices and profits becomes more and more difficult—and finally impossible—as overcapacity grows. This is particularly true in an industry where the overcapacity is not temporary, but is increasing with time. We observe in other industries that, at some percent of overcapacity, a supplier finds the temptation overwhelming to shave price for an increased market share or increased pounds, because the effect on his profits are so positive. Anything that speeds antiknocks toward that critical point has to be viewed with concern. (CX 207D) [53]

These perceptions, in this context, suggest a concern that price levels could fall if the practices facilitating coordination were abandoned. Price changes which are predicated principally on cost changes are unlikely to precipitate a fear that prices will "tumble." On the other hand, prices well above marginal cost could be subject to dramatic price reductions if aggressive price competition breaks out. In fact, the record shows a noticeable lack of aggressive price competition at any time during the relevant time period on any significant scale.

A propensity to compete for additional service also reflects a decision by company officials to avoid price competition. The record con-

tains numerous examples where respondents offered various services to particular customers but were consistent in their refusal to reduce prices from list. Complaint counsel's expert analyzed this tendency as indicative of a lack of price competition.[65]

3.1.3 *Respondent's Arguments and Justifications*

There is no real dispute about the high degree of uniformity among prices in this industry.[66] Respondents' principal argument, however, is that the underlying pricing dynamic in this industry is unaffected in a significant way by advance announcements of price increases. Moreover, they say that [54] advance notice has certain procompetitive benefits and that customers—the parties who would theoretically be harmed by anticompetitive practices—do not object.

Respondents say that price uniformity is the norm in a market with few sellers and homogeneous products. This contention is supported by expert testimony and by observations of company executives that different prices cannot be maintained for any sustained period because sellers rapidly learn of the differential and shift to lower-cost sellers.[67] Even in the absence of advance announcements, respondents argue that price increases initiated by one company would be learned by the other companies, who would decide whether or not to go along. If they did not follow the price increase, the initiator would presumably retreat from the proposed increase or risk losing substantial sales. For example, if Ethyl instituted immediately an increase, DuPont would learn about it quickly and determine whether to follow it. If DuPont did not respond in kind, Ethyl would retreat. Consequently, advance announcements do not significantly affect this pattern.

In addition, respondents say that advance notice promotes competition by encouraging competition in "forward ordering," that is, providing customers the opportunity to order in advance of a price increase scheduled to go into effect at a later date. Also, they say, advance notice is a spur to undercutting the initiator's price increase during the 30 day advance notice [55] period. (*See, e.g.,* DAB at 32) So, for example, if DuPont announces a 2.0¢/lb increase to be effective in 30 days, this gives Ethyl an opportunity to offer a 1.0¢/lb increase as an alternative. (By "undercutting" the respondents apparently mean a lower increase, not an actual price cut.)

Finally, they say, customers who testified at trial consistently did not object to the practice of providing advance notice and, in fact,

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[65] *See* Hay, Tr. 3825–28, 4374–75. This view is consistent with conventional economic theory. *See* fn. 60, *supra.*

[66] Respondents do make a spirited argument that the level of discounting, for a market with these structural characteristics was substantial. As we discuss elsewhere, the degree of discounting was limited to particular situations and it does not offset the principal pattern of non-competitive pricing.

[67] (*See, e.g.,* Wilson, Tr. 3291–92, 3295–56)

testified that it provided advantages to them. The principal advantage is the opportunity to "forward order" at the old price. (*See, e.g.,* McCormick, Tr. 2663–64, 2704–06; Stern, Tr. 3455–56; IDF 112) Respondents also point to the fact that the practice of advance notice has been followed for many years, including during the time Ethyl had 100% of the market. Thus, they contend, the practice could not have evolved with the purpose of stabilizing prices since it was initiated before price competition could occur.

3.1.4 *Discussion*

Under a rule of reason analysis, it is appropriate to consider the evidence of harm to competition as well as any procompetitive effects of the challenged practices. In addition, *Boise Cascade* makes clear that the Commission should carefully weigh the evidence of actual effects of the practices on the competitive performance of the market. We consider respondents' arguments in the context of these requirements.

As respondents point out, it is true that there are risks in proposing price increases even with advance notice, because uncertainty as to competitors' reactions is not eliminated. For **[56]** example, the response to an announcement of a price increase, effective in the future, might be an announcement of a planned smaller increase by the other competitors. This situation did in fact occur twice in 1977. Alternatively, the response to an announced future increase might be the *status quo, i.e.,* competitors leave their price unchanged, or, in theory at least, competitors could respond with an announced decrease. Strikingly, neither of these latter two scenarios ever occurred during the relevant period. The only response by the "second" company was to follow the first company's lead completely or, in a small minority of cases, to announce a smaller increase.

While there is a degree of uncertainty in determining pricing responses even with advance notice, the theory of the complaint was not that *all* uncertainty was removed, only that the environment was changed enough to have a substantial effect in promoting anticompetitive price coordination. While prices would likely have tended toward uniformity (except for special hidden discounts) without advance notice, the process of reaching uniformity without advance notice would have been fraught with a much higher degree of risk for the initiator of a price increase. An immediate price change would have created a time lag until other competitors learned of the increase and decided how to respond. During this period competitors would have been rewarded by increased sales for maintaining their prices. A decision by a responding competitor to effect immediately a smaller increase would also have presented substantially greater

risks without advance notice. The remaining competitors, if they [57] chose not to respond, would then gain sales from both the first and second initiators of price increases.

The actual pricing behavior in this market strikingly demonstrates how the risks were reduced—both to the initiator of a price increase and, in the few cases where it occurred, to the initiator of a lower increase in response to a previously announced increase. For example, in March 1977, Ethyl and DuPont simultaneously announced price increases of differing amounts. In the absence of advance notice, PPG and Nalco would have stood to gain sales immediately and, to the extent they could not meet additional orders, Ethyl, which proposed a smaller increase than DuPont, could have gained sales.

In fact, both DuPont and Ethyl not only gave the 30 days' required notice but each gave a few days extra notice, in the words of an Ethyl internal memo, so that "competition must reply by Friday [March 4, 1977]." (CX 114) DuPont, with the convenient opportunity to roll back its proposed price increase without ever having an effective higher price than its competitors, did just that by announcing an increase equivalent to Ethyl's on March 4.[68] This episode reveals how advance notice gave the opportunity for each company to change its price level without any company having a different effective price at any time. [58] Moreover, the initiators of the price increase, Ethyl and DuPont, were able to avoid any significant risk that they would be alone in their higher prices by providing an extra period for competition to "reply." Also, Ethyl was in an excellent position to assess DuPont's likely response to an additional increase, since DuPont had signalled its wish to raise prices already. In April 1977 Ethyl announced a price increase, again providing additional days' notice beyond the required advance notice period. An internal Ethyl document noted that "[c]ompetition must reply by 4–26–77." (IDF 176; CX 91, 1953Z82–83) The other three respondents did reply by April 26 and announced identical new list prices, effective on the same date as Ethyl's. Consequently, in two months, there were two price changes, with all four companies' list prices identical at all times and an overall increase of about 4% in list prices.

The companies themselves were well aware of the dynamics of advance announcements, a grace period for others to respond, and the opportunity for contingent rollbacks if competitors did not respond with identical price increases. The record contains numerous examples of Ethyl and DuPont executives considering the opportunity for the major competitor to respond during the grace period that proceed-

[68] PPG and Nalco apparently did not learn of the DuPont announcement until Monday, March 7, when it was carried in the press. Consequently, they made the new price effective on April 7, 30 days later. (IDF 175) Ethyl, responding to the fact that it would have had a higher price effective for 3 days before PPG and Nalco raised theirs, then changed its effective date to April 7, at which point the circle was complete.

ed the contractual thirty day notice period. (*See, e.g.,* McNally, Tr. 2129; CX 93A; CX 1953Z298) PPG executives also acknowledged that timing and amount of price changes were determined by the actions of Ethyl and DuPont. (J.M. Robinson, Tr. 1033, Fremd, Tr. 1592–93, CX 1285; CX 1286) [**59**]

The importance of giving advance notice is further illustrated by the pricing moves in August 1977. On August 15, 1977 DuPont announced a price increase effective only 31 days from the date of the announcement, on advice of counsel concerned about antitrust liability. (IDF 180) A few days later DuPont was informed by a caller from *The Wall Street Journal,* as well as a customer, that Ethyl had announced a smaller increase. On August 2 DuPont rescinded its original increase to match the timing and amount of Ethyl's increase. This was the first time a price increase had been intentionally undercut since other increases which were lower than an increase announced by the other major rival occurred simultaneously. (*See* IDF 54–55) In testifying about this incident, DuPont's Marketing Manager stated that this absence of an effective "grace period" before the advance notice made price-matching difficult. "By the time [Ethyl] learned of what we were doing they could not match the same effective date and give 30 days' notice." (Diggs, Tr. 2413) Because of the complexity caused by this absence of grace period, he testified, DuPont returned to providing more notice. "Well, my recollection is that in subsequent price changes after this date we lengthened the period somewhat by several days so as to provide time to test what the competitive reaction would be." (Diggs, Tr. *id.*)

The former DuPont Marketing Director testified about the reasons for giving more than 30 days' notice. He stated:

> [One reason was] to make sure we got it out to everybody in 30 days . . . And secondly, that is a very, very nerve-wracking, tense period, and we felt that our customers in many cases were [**60**] accusing us of being cavalier, that we really didn't give a damn what others were doing; we were on roads that said we were ignoring them.
>
> So what we tried to do was give them enough notice and *also an interval which gave our competitors a chance to respond, without having to change the effective date.* (emphasis added) (McNally, Tr. 2129).

These examples (and there are others in the record) show that it is highly likely that the pricing behavior in this market was significantly different than would have occurred without advance notice. It is reasonable to conclude that such precise uniformity of effective dates and price changes could not have occurred without the use of a grace period for competition to respond combined with contractual obligations for 30 days' advance notice of price changes. In making this conclusion, we rely upon the evidence showing how company execu-

tives themselves perceived the advance notice practice, the consistent pattern of price announcements and changes, the potential for price cutting to occur absent coordinated pricing, as well as our analysis of overall market structure and performance. On the basis of these findings, we believe it is reasonable to infer that the advance notice practices helped contribute to coordinated pricing, thus, supracompetitive uniform prices. While respondents, in theory at least, may have found ways to match prices without advance notice, it is reasonable to infer that such price-matching would have been more difficult and, consequently, that the likelihood of such pricing patterns without these practices was substantially lower. **[61]**

As to respondents' contention that advance notice was actually procompetitive because it encouraged "forward ordering" during the period before the new price became effective, we must consider this effect in the context of the effect of the advance notice practice on price competition. Forward ordering gave an opportunity to purchase at less than the new price announced, but it was limited by transportation, storage, and inventory constraints.[69] (IDF 80, 112) Consequently, forward ordering was a limited way to escape the effect of regular and uniform price changes, but not a device for escaping a price in effect at the time of ordering that was supracompetitive. Thus, forward ordering was of some benefit to customers, but was unlikely to be of sufficient benefit to offset the long term result of advance announcements in assuring lock-step price increases by all respondents.

As for the fact that customers who testified generally favored the practice of providing advance notice, we do not believe this is highly probative of the net competitive effect of the practice in this industry. The testimony by customers was essentially that they wished to have an opportunity to buy at the old lower price in advance of a new, higher price. Customer testimony was not specific about the degree of savings but **[62]** supported the general proposition that purchasing at the existing price before a price increase results in some savings. (*See, e.g.,* IDF 112) This is an understandable perspective, but does not contradict our fundamental conclusion. If asked, no doubt customers would testify that they favored price competition, too. Consequently, the question is whether the buyers' perception that advance notice enabled them to save on the purchase price is more than offset by our finding that advance announcements contributed greatly to uniform, supracompetitive pricing. In view of the limited extent of forward ordering and the extensive evidence of the contribution of advance announcements to price uniformity, we believe that buyer testimony

[69] As the ALJ notes, the record is not clear as to the amount of forward ordering involved. The benefit to customers from advance notice would consist of the amount ordered above the expected purchase in the absence of an advance notice of price change. The degree of forward ordering involved is suggested by DuPont's "in-house guidelines" to limit forward ordering to between four and six weeks' normal supply. (IDF 81)

does not justify a finding that the advance notice practices were, on balance, procompetitive.[70]

Finally, we do not believe the fact that advance price announcements were practiced before competitors entered the market means that their effects in the type of market presented here are not adverse to competition. It is true that the history of a practice may be relevant by showing the purpose of the practice, and purpose may be useful in assessing effects.[71] Here, however, there is no need to rely upon the proposition that the initial purpose of advance announcements was to facilitate [63] price uniformity in order to determine that the effect during the relevant time period has been to do so. As discussed further below, it is not surprising that a practice which was initiated for a benign purpose may become anticompetitive as the industry evolves, as other competitors adopt the practice, or as other practices are developed which, together with the earlier practices, produce an anticompetitive effect. Here we are confronted with a series of practices which interact to affect pricing behavior. While the initial purpose may be relevant in assessing current effect, as well as the use of the practice in other industries, our focus must be on the current effect of the practices in a particular industry.[72]

Respondents argue that the conclusion of the ALJ that advance notice had a substantial effect on pricing behavior is the kind of unfounded inference that the court in *Boise Cascade* found objectionable. We disagree. *Boise Cascade* does not require that the record evidence conclusively establish that all pricing behavior was a direct result of the challenged practices, nor does it hold that inferences cannot be drawn from applying conventional economic theory to the observed facts. Rather, the [64] court found that "the Commission has provided us with little more than a theory of the likely effect of the challenged practices." 637 F.2d at 578. In that case, we challenged parallel use of a freight factor, which was only one aspect of price. Here, we examine a series of practices which inter-relate to affect total price. There the market was less concentrated and other structural considerations were less compelling. In *Boise,* the record showed prices were in weekly flux without exact price-matching. Here, prices are much more uniform over time and move with lock-step rigidity.

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[70] Although the procompetitive advantages of forward ordering are not sufficient to offset the competitive harm caused by the combined advance notice practices, our finding of liability is limited to the use of the extra "grace period" and we do not prohibit advance notice and forward ordering under our order.

[71] *See, e.g., White Motor Co. v. U.S.*, 372 U.S. 253, 261 (1963).

[72] In this connection, we note that advance notice is used in other chemical industries (IDF 107) and that there was some testimony that advance notice was of no benefit to the sellers, only to the buyers. (*See, e.g.,* Robinson, Tr. 1046) Respondents' argument concerning the historical use of advance notice appears to be limited to the use of 30 days' notice, not the extra "grace period." (*See, e.g.,* EAB at 12) While the record is unclear on this point, Ethyl apparently gave only 30 days' notice when it was the only company in the industry. (*See* Koehnle, Tr. 4613–4614) The use of grace periods evolved later but the record is not clear when this development occurred.

practices. We view this factual record as stronger than that presented in *Boise.*

Anticompetitive effects are not always capable of being specifically identified or quantified at the time a determination is made as to the probable competitive consequence of a particular type of activity. Therefore, the courts apply appropriate economic theory to the available factual record in an effort to reach a reasoned conclusion as to the likely effects anticipated. Thus, the Supreme Court in *Container Corp.* utilized conventional economic theory about oligopolistic price competition to make an inference about the anticompetitive effects of an illegal price vertification arrangement. 393 U.S. at 337. The instant case presents a similar situation. However, here the advance price announcement practices facilitated price coordination, reduced the risks of increasing prices and impaired the free functioning of the competitive process thereby violating Section 5. This record, if anything, provides a stronger evidentiary basis than *Container Corp.* for inferring that advance **[65]** price announcements facilitated price coordination, reduced the risks of increasing prices, and distorted the competitive process.

3.2 *Press Announcements*

Up until 1977, all four respondents issued press releases announcing their intention to institute a new price after the advance notice period. The ALJ found that, in conjunction with the advance notice practices of respondents, press notices increased certainty about rivals' pricing moves and facilitated price matching. Respondents contend that competitors learned quickly of pricing moves from other sources of information, principally customers, and, therefore, press announcements were insignificant in increasing certainty about competitors' intentions. In addition, respondents say that press announcements are useful to customers in learning about developments in the market (*see, e.g.,* Tunis, Tr. 361–362) and that press announcements of price changes were a form of free advertising that kept the companies' names before the public and helped assure actual and potential investors that cost increases were being passed on in price increases.

The principal issue in this dispute is whether press announcements significantly improved the flow of information about pricing moves beyond that available through the customer-supplier network. Several factors point to a conclusion that press announcements did significantly improve the flow of information of future prices. First, it is clear from the record that all four companies paid close attention to price **[66]** announcements in the business press, and internal documents show a number of instances when company officials noted that they learned of price changes from the press. (*E.g.,* CX 292A; CX 936A;

CX 950A.) Second, press releases were generally issued on the same day as customer notification, though there were a few instances in which the press release was delayed for one to four days.[73] Publication typically followed within one day, though in a few cases it took as much as 3 days. (IDF 173)

In addition, there are at least two instances in which press announcements played a significant role in pricing actions. In the first example, discussed above, Ethyl and DuPont announced planned price increases simultaneously, though DuPont's proposed increase was higher. A report in *The Oil Daily* on March 3 noted that spokesmen for both companies said they were studying the situation and included a quote from the Ethyl spokesmen to the effect that it had "no immediate plans for further adjustment" of its prices. (CX 121, 831) One day later DuPont announced that it would retreat to the Ethyl price. It is hard to imagine that this incident would not constitute an unlawful exchange of information about current and future prices under well established caselaw if made directly from Ethyl to DuPont.

In a second example, the *Wall Street Journal* carried an incorrect story about the effective date of a proposed DuPont price increase, stating it would be effective on March 1, rather than February 24 as DuPont customers were told. (CX 149) PPG **[67]** then moved to meet the date published in the story, rather than the date told DuPont's customers.

On the other hand, respondents continued to learn about price changes from their customers after press releases were essentially abandoned. The record contains some examples in which competitors learned of price change notices on the same day they occurred. Of the 24 list price increases between January 1974 and June 1979, one or more of the competitors first learned of the increases from customers on 18 occasions, typically within one day. (*See* EAB at 43–44, fn. 102, and the exhibits cited there.) Finally, the pricing patterns established before 1977 continued to be essentially the same after press releases were abandoned.

A further consideration is respondent's argument for the procompetitive effects of press announcements. It is certainly true that press announcements have some value generally to customers wishing to follow industry developments. However, in this industry, there are few customers (only about 150) and they are traditionally informed by direct notice. (IDF 108–111) Consequently, press announcements provided little additional information. As to respondent's arguments that these announcements were a form of "advertising," useful in getting respondents' names before the public, and that they were helpful in

[73] *See* App. D of the Initial Decision.

comforting investors that costs would be passed along, there is little in the record to support these propositions except self-serving testimony. [68]

In summary, while respondents' justifications for press announcements are not convincing, it is impossible to conclude on the basis of this record that press announcements contributed significantly to the other factors promoting price coordination, particularly, the advance notice practices. This conclusion is not to say that press announcements cannot be anticompetitive and serve as a device for stabilizing prices, either intentionally or unintentionally. In this case, however, the customer-supplier network is quite effective in conveying price information, so that the additional contribution of press announcements was of marginal effect.

3.3 *Most Favored Nations Clause*

The third practice challenged in the complaint is the use of "most favored nations clause"—contract provisions which require offering the benefits of a lower price to all customers if it is offered to any. The theory of the complaint adopted by the ALJ is that these clauses reduce price competition by reducing the incentive for the seller to provide any discounts, since it has contractually obligated itself to do so only if its overall pricing level is reduced. Further, the ALJ concluded that the use of these clauses by at least the two major competitors was known by both DuPont and Ethyl and increased the certainty on the part of both that neither would discount.

All four companies have used these clauses, but PPG and Nalco's use has been more limited. In particular, PPG does not include the clause in its standard contract and the complaint does not charge it with this practice. (Complaint, ¶12(b)) [69] Ethyl abandoned use of the clause in January 1981, but well after the complaint was issued.

Complaint counsel's expert witness testified that the most favored nation clause reduced price competition in several ways. First, it reduced the incentive of a supplier to discount since any discount would have had to be extended to all customers. Second, extending the discount, as required by the clause, would make the granting of a discount more noticeable to competitors. Third, to the extent that other competitors were aware of the clause, it increased confidence the other firm would not discount. Finally, the clauses were used to "suppress customer reaction to high prices" by serving as a justification for failure to consider discounting. (Hay, Tr. 3813–14) Dr. Markham testified that the clauses were simply a restatement of the policy that would be followed without them. (Markham, Tr. 6819, 6896) Dr. Mann testified that the clauses had no effect because he saw no evidence in the record that they did have an effect and that the clauses

restated the Robinson-Patman Act. He also stated, however, that evidence that such clauses did have an effect would include recognition by a respondent that the clauses helped maintain a systematic viewpoint among competitors as to reliance upon the clauses in rejecting requests for discounts. Mr. Glassman testified that overall the challenged practices did not have an anticompetitive effect. However, in regard to the most favored nations clauses, he stated that, had he recalled any evidence of adverse competitive impact he "would have perhaps said that to a very limited extent, the existence of a [70] most-favored nations clause could have added just a tiny bit to the possibility that there would be no price discounts." (Glassman, Tr. 6508) He also testified the clauses were used by Ethyl and DuPont as "an excuse for not discriminating among customers and giving discounts." (Glassman, Tr. 6511). At trial, he did not concede that the absence of the most favored nations clause had any relationship to PPG's ability to compete. (Glassman, Tr. 6514) However, in his deposition, he testified, "The absence of a most favored nations clause in PPG's business helps them compete because they don't feel at all constrained in terms of giving special deals and discounts." (Glassman, Tr. 6514–15)

Dr. Carlton said that the use of these clauses by Ethyl and DuPont could not have had an adverse effect on competition since Ethyl was not constrained from granting a discount and since neither Ethyl nor DuPont was influenced by the fact that the other had this clause in contracts.

While the experts disagree on the actual effect of the clause in this industry, respondents' experts appear to reach the conclusion that the clauses had no effect, because: 1) the non-discounting pricing policies would be followed in any event; 2) Ethyl and DuPont were similarly constrained by the Robinson-Patman Act; or 3) Ethyl and DuPont had no real confidence that the other would actually follow the obligations of the clause.

At the outset, it is useful to distinguish the requirements of the clause as interpreted by respondents from those of the [71] Robinson Patman Act.[74] In general, Ethyl and DuPont interpreted the clause to customers to mean that a discount provided to one customer would have to be provided to all. (*See, e.g.,* Lockerbie, Tr. 764–67; IDF 117–118) One internal Ethyl analysis, however, interpreted the clause to mean that an equal discount would only have to be offered to customers purchasing the same or greater quantities. (IDF 192) In contrast, the Robinson-Patman Act prohibits discrimination in prices which substantially lessens competition, unless the seller can prove that a difference in price was justified by cost differences or was a good faith

[74] 15 U.S.C. 13.

effort to meet a competitor's price. For our purposes, the "meeting competition" and "cost justification" defenses under the Act highlight the most significant differences between the Act's effect and the operation of respondents' most favored nations clauses.

There is little doubt that a company using the clause has an additional incentive not to give selective discounts. Doing so triggers a contractual obligation to lower its pricing level to all customers, thereby perhaps reducing profits generally, or to risk legal liability by violating its contractual obligation. The companies in fact frequently relied upon the clause in telling customers why they refused to provide discounts. (IDF 194) DuPont recognized that offering a discount to Exxon, or other companies, could result in a general price decline. (CX 1081A; IDF 197) Ethyl also recognized that the clause restricted [72] its pricing flexibility. (IDF 197) These companies' internal documents indicate that executives viewed the clauses as having a significant effect on their pricing policies. (See IDF 197–199) All the economic experts who testified were of the opinion that these clauses —if adhered to—could reduce the incentive to discount to selective customers. PPG's expert testified that the absence of the clause helped PPG discount. (IDF 200) Thus, it is difficult to accept respondents' contentions that the clauses played no role in pricing behavior. Frequent reliance on the clauses, both within the company and to customers, indicates otherwise. Moreover, the record shows that Ethyl and DuPont's knowledge that each used the clause affected each company's perceptions about the other's likely pricing behavior. Ethyl's management discussed the impact of the most favored nations clause in internal reviews. An Ethyl management review in November 1975 referred to the fact that both DuPont and Ethyl had most favored nations contracts and that PPG and Nalco were "less encumbered." (CX 394Z5; IDF 197) In 1977, Ethyl's Chairman asked about a possible "free-for-all" if "DuPont abandoned their most favored nations provision with the next set of contracts." (CX 222B) Ethyl's Director of planning testified about the question posed in the 1975 memorandum:

> Petroleum Chemicals made a point . . . that the favored nations restricted their ability to take actions. So [the President of Ethyl] said, "Okay, suppose DuPont [removed the most favored nations clause] and you didn't do it? Now what would you do? Here you may have to take an action." (Day, Tr. 615) [73]

An Ethyl Management planning document in March 1977 observed that removal of the clause could precipitate significant marketing changes:

> . . . we would have to extend the same reduced price to any . . . customer who buys more

from us . . . With a new contract that eliminated the favored nations clause, we could meet competition at a selection discount without having to extend the discount . . . The only advantage of a new contract is that it allows us to meet competition selectively. However, the fact that [Ethyl] was cancelling old contracts and eliminating the favored nations clause would be known to competition almost immediately. *It would signal to them a basic change in sales strategy.* (emphasis added) (CX 220 P-Q)

DuPont also believed that it could not eliminate the most favored nations clause without creating a substantial change in the perception of its marketing strategy. DuPont's Director of Marketing testified:

Q: Could you have eliminated [the clause] in your judgment, if you wanted to?

A: No. Even if I had done nothing more than walked out to the marketplace and said, "We are going to take the [clause] out of contracts," the reaction that would have produced would have been one of wild speculation as to why. I mean this thing was in practice for an extended period of time—I don't know how long; I guess since we were in business—and if we had pulled the thing out, my judgment says that I would have reacted in the same way. I would have said, "What are you doing? Who's got the deal? How much of the deal can I get? What's going on?" And even if there was no deal, it was just one of those things that by default would have been impossible. (Tunis, Tr. 392–393)

The record contains an example of how the most favored nations clause affected the pricing considerations of DuPont. In [74] responding to a request by Exxon for a price quotation on an F.O.B. plant site basis, the DuPont sales representative assessed the likelihood that competitors could accept Exxon's offer. He concluded Ethyl was unlikely to do so and testified that the most favored nations clause was probably a factor in his assessment. (Miller, Tr. at 2000).

Both Ethyl and DuPont contend that, on the one hand, they could have discounted without the clause and, on the other, that there was no incentive to discount because rivals would have learned of the price cuts and matched them. In fact, neither Ethyl nor DuPont ever discounted with one possible exception.[75] Admittedly, as in the case of evaluating the effect of advance notice of price changes, there is no convenient laboratory experiment available to confirm how Ethyl and DuPont would have behaved in the absence of the clauses. As discussed above, however, the record provides a solid basis for an inference that these clauses made a significant contribution to reduced price competition when used in conjunction with the other practices we find anticompetitive. In reaching this conclusion, we rely also upon the particular circumstances of this industry, including its structure and performance, as well as evidence about the effect of these clauses. In an industry with periodic discounting by the leading

[75] Ethyl gave a small discount to [***] in return for [***] (IDF 58) The significance of this discount is unclear except in the conspicuousness of its isolation.

firms, despite the contractual use of such clauses, or in an industry with a structure less likely to [75] result in interdependent behavior, a different conclusion might be appropriate.

Against the indications that the most favored nations clause discouraged selective discounting, we must weigh respondents' arguments justifying the use of such clause. Respondents' principal proffered business justification for the use of these clauses is that they are desired by customers who wish to insure they are not disadvantaged.[76] Refiner testimony was generally to the effect that the clause provides some assurance that they are not receiving discriminatory prices and that they were on an equal footing with major companies. We are mindful of the need to consider carefully stated customer preferences, particularly when the theory of the complaint is that unlawful anticompetitive pricing has its most direct effect on them. However, this is a particularly good example of a practice which may be desired by individual customers, viewed from their limited perspective, while proving harmful to customers as a class. As in the cases of advance notice of price changes and uniform delivered pricing, a complex inquiry is required to determine effects on an industrywide basis. Thus, an individual customer's perspective, though deserving careful consideration, is inevitably limited in shedding light on the overall effect on competition. The preference of customers expressed in testimony was that they did not wish to be at a price disadvantage in relation to other [76] companies. However, this preference for market performance directly conflicts to some degree with a market performing competitively since more frequent discounting, particularly by the dominant firms, would no doubt have improved overall market performance. Consequently, we do not view customer testimony favoring these clauses as sufficient to offset other evidence in the record demonstrating their anticompetitive effect.

To the extent respondent attempts to justify the practice on the grounds of "fairness" or "ethical" business behavior as some of the testimony suggests, we reject that notion. Expert testimony in this matter and conventional economic theory support the principle that selective discounting is procompetitive rather than anticompetitive in the context of this market structure and absent competitive injury of the type prohibited by the Robinson-Patman Act.

3.4 *Uniform Delivered Pricing*

The fourth type of practice challenged in the complaint is uniform delivered pricing, that is, offering products for sale, including freight,

[76] We have already discussed the argument that the clauses carry out the purposes of the Robinson-Patman Act. To the extent the clauses go beyond the requirements of the Act, as they clearly do, this justification obviously fails.

at the same unit price to any customer in the U.S. Under this system, for example, Nalco would sell products from its Texas plant to a California customer at the same price as DuPont would sell to the same customer from its California plant. The theory of the complaint is that this practice of quoting uniform delivered rates makes interdependent price coordination much easier by removing the complexity of attempting to match a competitor's total price—base price plus freight [77] calculated for a particular customer—and instead matching a standard list price to all customers which includes freight.

The practice of quoting prices on a delivered basis was initiated by Ethyl in the 1930's when it was the only firm in the industry. (IDF 124) Respondents use leased facilities, primarily rail tank cars, to ship their products. In cases where buyers have asked to be quoted an F.O.B. manufacturing plant price (that is, price if the buyer assumed responsibility for transportation), the respondents have refused. Sun, Exxon, and Shell, for example, requested price quotes on this basis. (IDF 189)

Expert testimony in this case disagreed as to whether uniform delivered pricing helped to reduce price competition in this industry. Complaint counsel's expert, Dr. Hay, testified that consistently quoting prices on this basis makes it clear whether a competitor is discounting and simplifies the price to be communicated for purposes of price-matching. He believed the practice did reduce competition in this industry. (*See* Hay, Tr. 3812–14) Dr. Markham testified that delivered pricing does not reduce uncertainty because freight costs are too small to be significant (Markham, Tr. 6813) and that price-matching could occur, even if prices were quoted on a non-delivered basis, because rival's freight costs could be easily calculated. (Markham, Tr. 6814–15; 6894) Dr. Mann testified that if all the manufacturers adhered to a uniform delivered pricing system, uncertainty would be reduced, but that he had "not seen any evidence that [persuaded him] that that's the case." (Mann, Tr. [78] 5671–72) Mr. Glassman's testimony appears to be that uniform delivered pricing could facilitate price-matching but that freight costs were a small proportion of costs in this industry and, therefore, that uniform delivered pricing had not led to resource misallocation. (Glassman, Tr. 6521–25)

Thus, as in the case of advance price announcements, there is general agreement among the expert witnesses that uniform delivered pricing can facilitate price-matching but disagreement over whether it had an effect in this industry. Also, as in the case of advance price announcements, it would be difficult to dispute the proposition that uniform delivered pricing may reduce price competition, since it is generally recognized as capable of [79] doing so in economic litera-

ture.[77] The Commission, upheld by the courts, has challenged base point pricing systems on several occasions.[78]

The courts and the Commission have applied different legal standards in assessing base point pricing schemes under the Sherman Act and the FTC Act depending upon whether agreements to use delivered pricing were found. The Commission indicated in *Boise Cascade Corp., supra,* that an agreement by competitors to fix one element of price would be *per se* unlawful.[79] On the other hand, in *Triangle Conduit, supra,* the court of appeals found a violation based upon individual use of base point pricing in an industry with particular characteristics which made price [80] coordination likely.[80] Thus the court appeared to engage in a limited rule of reason analysis to determine whether the pricing practices followed by individual companies were likely to have a anticompetitive effect.[81]

A national uniform delivered pricing scheme is essentially a variation of a base point pricing scheme since all competitors are absorbing different freight costs for different customers in order to arrived at a single, uniform delivered rate. Here, we apply a rule of reason analysis to determine whether, based on the structure of the market, the observed performance of the market, and the evidence connecting the use of uniform delivered pricing with observed pricing behavior shows it is likely that respondents' individual use of delivered pricing, together with the contemporaneous use of the other challenged practices, substantially reduced competition.

The pricing patterns in this industry, as discussed above, are striking in the degree to which uniformity has been maintained and prices for all respondents have moved upward or downward (mostly upward) in lockstep fashion. As discussed at length above, the price movement dynamics in this industry have [81] depended upon the price leadership of Ethyl or DuPont periodically "testing the waters" with a price

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[77] *See, e.g.,* Scherer, *Industrial Market Structure and Economic Policy* 325–334 (2d ed. 1980); P. Areeda, *Antitrust Analysis* 273–75 (3rd ed. 1981) "A delivered price system permits each seller to quote the same price to every buyer regardless of location. Thus, the most troublesome effect of an industrywide, rigid, delivered pricing system may be to facilitate noncompetitive pricing." *Id.* at 383 (citations omitted); R. Posner, *Antitrust Law: An Economic Perspective* (1976). "The purpose of basing point pricing is to facilitate collusion by simplifying the pricing of colluding firms. . . . It is plainly inconsistent with competition, which would quickly eliminate any phantom freight charges." Id. at 70–71. *See also, e.g.,* C. Kaysen, "Basing Point Pricing and Public Policy," 63 Q.J. Econ. 289 (1949). *See also* Justice Department Guidelines. "Although not objectionable under all circumstances [mandatory delivered pricing practices] tend to make collusion easier, and their widespread adoption by firms in the market raises some concern that collusion may already exist." *Id.* at 37.

[78] *See, e.g., FTC v. National Lead Co.,* 352 U.S. 419 (1957); *FTC v. Cement Institute,* 333 U.S. 683, 713 (1948); *Triangle Conduit & Cable Co. v. FTC,* 168 F.2d 175 (7th Cir. 1948), *aff'd by equally divided court sub nom. Clayton Mark & Co. v. FTC,* 336 U.S. 956 (1949). Delivered pricing schemes have also been challenged under the Sherman Act. *See, e.g., Maple Flooring Manufacturers Assoc. v. U.S.,* 268 U.S. 563 (1925).

[79] 91 F.T.C. at 100.

[80] For example, the court of appeals noted that the sellers were geographically dispersed, sellers refrained from offering F.O.B. mill prices, and there was regular price-matching. 168 F.2d at 177–179.

[81] "We cannot say that the Commission was wrong in concluding that the individual use of the basing point method *as used here* does constitute an unfair method of competition." *Triangle Conduit,* 168 F.2d at 181. (emphasis added) The Commission also had found a likelihood of anticompetitive effects. 38 F.T.C. 534, 593 (1944).

change and retreating if necessary. In the great majority of cases, retreating has not been necessary, because the other competitors have demonstrated their willingness to adopt the initiator's proposed price increase. In the few cases where retreating was necessary, this was achieved by responding to the second pricing move. In the only cases where such a retreat was necessary, the second pricing move was to propose a smaller increase and all the other companies went along.

Essential to this pricing pattern was a standard price list for the two principal products, facilitating swift and coordinated price movements. The respondents were aware that the general pattern was for all to use uniform delivered pricing. (IDF 184; Tunis, Tr. 138) In addition, there was testimony that delivered pricing contributed to competitors' knowledge about others' price levels. (*See* Fremd, Tr. 1704).

The record provides an example of DuPont's resisting granting Exxon a price quote on an F.O.B. basis because of the likely competitive reaction of Ethyl. DuPont's Director of Marketing testified:

> Q: What disadvantage did you see in extending this innovative special price to Exxon?
>
> A: Well, I saw all kinds of problems that we have talked about relative to this price being placed in the competitive realm, the information to my competition, reaction to that kind of price at other accounts, and a general deterioration in the overall pricing of antiknock compounds. (Tunis, Tr. 441) [82]

Further, he was asked why he assumed Ethyl would not grant such a discount either. He answered:

> Well, again you have to look at DuPont and you have to look at Ethyl and [PPG] and Nalco as entities in the marketplace. And Ethyl is about evenly positioned with DuPont, both in terms of the market share, in terms of cost, in terms of their capabilities to service accounts, sidetracks, delivery fleet—equal product.
>
> Q: What did that have to do with what you believed, even shakily, that Ethyl might do?
>
> A: An extension of rational logic. If it was not good for us, it was my perception it would not have been good for Ethyl Corporation at that point in time. (Tunis, Tr. 442)

We would expect major rivals to assess the other's likely pricing behavior in a highly concentrated market. Here, DuPont and Ethyl were able to rely on the convenient standard of a delivered price to avoid uncertainty in interpreting each other's pricing posture. Granting Exxon F.O.B. price might not have been a real "discount" in the sense lower price might only have reflected the omission of transportation costs. Yet it is clear that F.O.B. pricing would have been viewed as aggressive pricing which both Ethyl and DuPont wished to avoid.

In general, discounts were made known to other competitors by customers.[82] Consequently, Ethyl and DuPont were deterred in part from granting discounts because there was a substantial risk the other would learn about it. F.O.B. pricing would have introduced the complexity of "masking" discounts because it would have introduced price variations among customers. [83]

Complaint counsel's expert witness testified that uniform delivered pricing had the effect of simplifying the communication of prices for 150 different customers, and increased the confidence of a competitor that its rival's price was at list price rather than at a discount. The thrust of respondents' experts' testimony on delivered pricing was that delivered pricing could contribute to price-matching, but it was unlikely to have a significant effect because prices could be easily matched without this practice. (*See, e.g.,* Glassman, Tr. 6521–6524; Markham, Tr. 6814–6815)

We conclude there is no real dispute as to the general proposition that pricing complexity in itself interferes with price-matching.[83] The argument between the parties thus appears to be whether delivered pricing in this industry contributed significantly to price matching or whether it was equally likely to occur without it. Respondents' principal argument on this point is that the companies could easily match total delivered prices by observing quoted base prices—[84]excluding freight charges—and calculating freight rates by use of standard freight tables, use of freight cost experts, or the like.

The only freight rate expert who testified in this matter was Mr. Kripphane. The thrust of his testimony was that calculating freight rates in order to match competitors' prices would be relatively easy:

> I don't see any uncertainties in calculating what the freight charges might be. They're there, you know. We have all the rate information that we need available to do that job . . . We are doing it now [with respect to sulphuric acid]. (Kripphane Tr. at 5063)

On the other hand, there is testimony from company executives that determining competitors' freight costs and rates would be difficult. PPG's Vice-President and General manager testified:

> Q: If both PPG and DuPont were to sell on a manufacturing-point basis plus freight, would you consider it mind-boggling to match the price of DuPont at Getty?

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[82] *See, e.g.,* EAB at 38–39; IDF 129; IDF 142; DAB 29.

[83] Professor Areeda describes a general proposition about behavior in an oligopoly: "[U]ncertainty about rivals' behavior may force each oligopolist to act more like a perfect competitor. He will price nearer his costs in order to win each sale when he lacks confidence that a higher price will not be undercut by a rival. Such uncertainty, with its attendant impairment of oligopolistic coordination, grows as the number of transactions declines, as public knowledge lags or fails, and *as transactions became less comparable."* (emphasis added) Areeda, *supra,* at 274–275. Avoiding different product brands or configurations, states Professor Areeda, "accounts for some industry attempts to adopt delivered pricing so as to standardize transportation costs, to reduce product variety, or to adopt some common denominator for disparate goods." *Id.,* fn. 7.

A: Getty and possibly 70 other customers. Yes, it would be a difficult, complex structure to develop to remain competitive under that situation . . . So the whole problem would be quite complex, in my thinking. (Robinson, Tr. at 1050–51)

Other testimony and internal documents support the proposition that matching freight costs would be difficult because of the large number of variables involved. (*See, e.g.*, IDF 185–187) Thus, while it is true that freight tables during the relevant period were fixed and published by federal and state agencies, there are actually a number of complexities in matching [85] competitors' prices based on these tables. Freights vary based on the particular point of origin, the size of the tank car used, and the carrier route chosen. If two or more types of vehicles are used in transit, for example, shifting from jumbos to smaller cars, a new variable is introduced. Shippers may also qualify for reduced rates based on volume shipments over time and such savings would not be known until the end of the period. If refiners were permitted to take delivery at respondents' plants, or at transloading terminals, they could qualify for such discounts. (Krippahne, Tr. 5141–43)[84]

The nature of the industry confirms that price matching would be considerably more difficult if list prices were quoted on a manufacturing plant basis. Respondent's plants are scattered over the United States. Ethyl's plants are in Louisiana and Texas. DuPont's plants are in New Jersey, California, and Beaumont, Texas. PPG's plant is in Beaumont, Texas. Nalco's plant is in Freeport, Texas. (IDF 1–4) The more than 150 customers are similarly scattered through the U.S. In order to determine the total price charged a competitor, any respondent would have to estimate freight costs from each of the other plants to each of the other customers and, if it were to be matched, adjust its own base price, freight charge or both to do so. This in turn would produce inequality among respondents' [86] prices to its own customers and require further adjusting. Moreover, estimating prices based on costs would be hazardous, since, even if the cost estimates were correct, the competitor might not charge freight rates reflecting costs. That, in fact, is the predominant pattern now since prices do not even attempt to reflect varying transportation rates.[85]

Respondents argue that they could rely on information from cus-

[84] DuPont apparently made a number of errors in one ambitious attempt to calculate minimum freight costs to every domestic refinery from the closest antiknock compound plant. (Kripphane, Tr. 5108–12) This complex process would necessarily be taken on a periodic basis under respondents' scenario.

[85] To the extent respondent argues that freight cost estimates can be easily made based upon freight rates fixed and published by government agencies, we note that Congress has enacted legislation giving more flexibility to carriers in setting freight rates. Staggers Rail Act of 1980, Pub. Law No. 96–448, 94 Stat. 1895 (1980). We do not rely on this statutory development to conclude that uniform delivered pricing has facilitated anticompetitive price uniformity in the past and we consider it only for the purpose of determining the need for and effectiveness of a cease and desist order. Even with published rates for common carriers, sellers have been free to deviate from these rates in quoting total prices to customers.

tomers to match rivals' delivered prices without having to estimate freight rates based upon information about customers. As Ethyl's counsel puts it, "[E]ven in the absence of uniform delivered pricing respondents could immediately learn of and match one another's effective prices, either by talking to customers or by studying published freight rates." (EAB at 47) In contrast, however, DuPont's Director of Marketing testified that F.O.B. plant pricing to a large customer could lead to "a general deterioration in the overall pricing of antiknock compounds." (Tunis, Tr. 441) This statement strongly suggests uniform delivered pricing is necessary to avoid introducing [87] uncertainty and complexity into the process of price-matching, resulting eventually in price competition.[86]

The scenario proposed by respondents—facile price-matching by calculations of rivals' freight costs—is extremely difficult to accept. At the very least, it posits that respondents would begin to match prices on a customer by customer basis since competitors would not be quoting all customers the same delivered price. In short, notwithstanding Mr. Krippahne's testimony, we believe the preponderance of the evidence shows that it would have been considerably more difficult for respondents to achieve the high degree of price matching that occurred during the 1974 to 1979 period without the convenient common benchmark of uniform delivered prices.

Respondents offer a number of justifications for the use of uniform delivered prices, pointing to consistent customer testimony favoring the practice, the hazardous nature of the [88] materials and the desire by customers to avoid responsibility for delivery, and the efficiencies in avoiding the cost of calculating freight rates on an individual basis. We discuss each of these in turn.

As to the argument that customers desired delivered pricing, it is clear from the record that customers periodically requested that respondents quote prices on a F.O.B. manufacturing plant basis. In addition, the appropriate remedy in this case, as proposed by the ALJ, is not to require all prices be quoted on an F.O.B. basis but to give customers this option. Thus, customers who prefer not to negotiate on an F.O.B. plant price will continue to purchase on a delivered price basis. Finally, we note that customers view the challenged practices

[86] It has been asserted by a number of commentators that delivered pricing in a tight oligopoly is necessary to maintain stable pricing and avoid a breakout of price competition. "If the discrimination [in freight absorption] is unsystematic both mills will be uncertain how low a price they must quote to win an order in their home territories. . . . such uncertainty can precipitate a breakdown in oligopoly discipline, culminating in a general erosion of the price structure, cuts in the announced F.O.B. mill price, and perhaps even outright price warfare." Scherer, *supra*, at 327. *See also, e.g.*, Stigler, *The Organization of Industry* 161–162 (1976). Respondents also suggest that freight rates are insignificant because they are a small portion of the price. (*See* IDF 190). However, small changes in price inevitably introduce complexities into price-matching which complicate the overall pattern and thus have more impact on competition than suggested by the portion of total costs. The importance of even small changes is indicated by respondents' concern about precise matching of prices and effective dates before the price change "rounds" of announcements and adjustments were completed.

from a particular perspective—the effect on their individual firms if the practice is changed as to them. It is difficult for any customer to view the desirability of the challenged practice as turning on its effect on overall price competition—a conclusion which requires a complex analysis of the structure of the industry and assessments by economic experts. No doubt, if asked, every customer would testify it desires price competition which could lead to lower prices.

We also reject the argument that the toxicity of the materials justifies a practice with such an effect on price competition. First, customers, under our order, are free to continue to purchase products on a delivered basis. Second, customers are free to negotiate when the risk of loss passes from the seller to the buyer. The carrier is ultimately responsible **[89]** for safe intra-transit delivery in the absence of a contractual agreement to the contrary. U.C.C. Section 2–509.

Finally, we consider the argument that delivered pricing reduces costs by avoiding the need to estimate freight charges on an individual transaction basis. While we do not necessarily disagree with this argument as a general proposition, we note that this argument is inconsistent with respondents' contentions that the process of estimating freight costs is easily accomplished. There was testimony that respondents could use published freight information to determine rates between different points. (IDF 187) However, it is a much stronger proposition that a single seller can calculate its own freight rates to various parts of the country on a predictable basis, given its knowledge of its own modes of transportation, shipping volumes, etc., than that respondents could easily regularly calculate competitors' freight costs for purposes of facile price-matching. Evidence was offered at trial that some respondents already calculate freight costs to insure they are using low-cost shipping methods and the carrier has not made errors in calculating costs. (CPF 10–12) To the extent, as respondent argues, that most customers want to purchase on a delivered price basis, the costs of calculating freight rates will occur only for a minority of transactions. Given this evidence, we conclude that the advantages of optional F.O.B. pricing are not outweighed by the limited costs of each respondents' own freight calculations. **[90]**

There is also a failure of proof on the novel proposition that smaller refiners tend to be advantaged over large refiners by delivered pricing. (*See* IDF 19)

4. *Findings of Liability*

4.1 *Liability of Ethyl and DuPont*

Based on our review of the market and the effect of the challenged practices, we conclude that the combined use by Ethyl and DuPont of

"grace periods" in advance of contractual requirements for advance notice, most favored nations clauses, and uniform delivered prices, under the particular circumstances presented here, were unfair methods of competition. The regular use of these "grace periods," in conjunction with the other enumerated practices, contributed substantially to uniform, supracompetitive prices by facilitating systematic price-matching by all members of the industry. There is little doubt that pricing behavior would have been much different had there been no opportunity for the dominant firms to test the waters, then adjust prices according to subsequent pricing moves by the other three competitors.

We emphasize that we have reached this conclusion only after a thorough review of market structure and performance and an examination of the actual effects of these practices on pricing behavior. Thus, we reject the argument that the Courts have upheld advance price announcements as lawful under all circumstances. (*See, e.g.,* DAB 7) The references to the lawfulness of advance price announcements in *Catalano, Inc. v.* [91] *Target Sales, Inc.*[87] and *U.S. v. General Motors Corp.*[88] stand only for the proposition that, *standing alone,* without evidence of anticompetitive effects, advance price announcements are not unlawful. However, because of the absence of persuasive evidence that press announcements contributed significantly to the anticompetitive market behavior presented here, we decline to find that press announcements, as used by the parties, were unfair methods of competition. Consequently, we do not need to resolve the issue of when and under what circumstances press announcements may be enjoined because of anticompetitive effects, consistent with the First Amendment.[89]

The use of most favored nations clauses and uniform delivered pricing by Ethyl and DuPont in conjunction with the advance notice practices, under the circumstances of this case, contributed significantly to price-matching and non-competitive market performance. We reject the argument that most-favored nations clauses are inherently lawful because they further the purposes of the Robinson-Patman Act. It is clear that the clauses go farther than contractually binding the company to comply with the Act. In view of their regular use by the dominant firms and the adverse competitive effects demonstrated by the record, we find their use to have been an unfair method of [92] competition. We also reject the argument that use by the General Services Administration of the clauses compels a finding that they are lawful under all circumstances. Use of a practice by a govern-

[87] 446 U.S. 643, 647, 649 (1980).

[88] 1974–2 Trade Cas. (CCH) ¶75,253 (E.D. Mich 1974).

[89] *See Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 566 (1978) for the general test for constitutional limitations on non-deceptive commercial speech.

ment agency cannot be dispositive as to whether its use by private parties may constitute an unfair method of competition under all circumstances. Our decision today does not find use of the clauses *per se* unlawful, only prohibited under particular circumstances such as those presented here.

We also reject arguments that uniform delivered pricing has been upheld as *per se* lawful by the courts or the Commission. A Commission Advisory Opinion cited by respondents[90] dealt with the requirements of the Robinson-Patman Act and was limited to the facts presented there. Nor do we read *Boise Cascade*[91] to affirm the lawfulness of uniform delivered pricing. The *Boise* court holding was limited to the proposition that there was insufficient evidence of actual adverse effects on competition to sustain a finding that the base point pricing scheme reviewed there was an unfair method of competition.

Here we are not dealing with the requirements of the Robinson-Patman Act's prohibition of price discrimination which substantially lessens competition. Instead we are faced with a systematic use by all industry members of uniform delivered prices in a competitive environment highly susceptible to uniform, supracompetitive pricing and which, in fact, displayed **[93]** highly coordinated price changes over a prolonged period. Respondents' plants are scattered across the country and more than 150 industry customers are similarly distributed nationwide. The industry's structure is strikingly non-competitive as is the industry's pricing performance. The record shows that, in the absence of uniform delivered pricing, it is highly likely that variations in price would occur, based on distance and mode of transportation. Moreover, some customers would desire to purchase products on an F.O.B. manufacturing site basis. Further the record shows that the feasibility of price-matching based estimating rivals' freight rates is quite limited. Expert testimony is divided as to the effect of uniform delivered pricing in this industry, though there is general agreement that delivered pricing can contribute to non-competitive pricing under some circumstances. Finally, conventional economic scholarly analysis of this practice is that it may serve as a device for reducing price competition, whether it is a result of express agreement or conscious parallel behavior. Under these circumstances we believe it is reasonable to infer that the individual use of uniform delivered pricing by respondents reduced price competition.

We believe the record shows that use of these three practices by Ethyl and DuPont substantially lessened price competition. Nevertheless, it is, as a practical matter, impossible to assess the precise contribution each of these **[94]** practices made to reducing competi-

[90] *See* Advisory Opinion Digest No. 194, 73 F.T.C. 1309 (1968).

[91] *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

tion. It is possible that, in the absence of uniform delivered pricing, the system of advance price announcements with a grace period for competitors' responses would not have functioned as such an effective device for coordinating pricing moves. Similarly, most favored nations clauses might have been ignored if advance announcements had not been utilized in a way which facilitated pricing coordination. Nevertheless, we feel confident in concluding that each of these practices reinforced the effect of the other and made a significant contribution to reducing contribution.

Admittedly, it is not possible to make precise estimates as to how the market would have functioned without these practices. Inevitably, we must draw certain inferences about the likelihood that price competition will improve in this industry in the absence of these practices. Section 5, and much of antitrust analysis generally, does deal in probabilities. In our view the performance of this industry over the relevant period and the strong factual record linking the challenged practices with poor pricing performance provide an ample basis for concluding that it is more likely than not that the challenged practices reduced competition.

As described further below, we believe there is a strong likelihood that price competition may be restored to this industry by prohibiting Ethyl and DuPont from use of most favored nations clauses, the exclusive use of uniform delivered pricing and the use of "grace periods" prior to advance announcements of price increases. The ban on most favored nations clauses by [95] Ethyl and DuPont is warranted because the record shows they inhibited discounting by both companies and they increased the confidence of each that the other would not discount. In addition, the procompetitive justifications for these practices proffered by respondents are not persuasive. They essentially amount to a claim that individual customers prefer them because no single customer wants to be at a price disadvantage. As we state elsewhere, this is an understandable perspective from the point of view of an individual customer that is not necessarily consistent with the long run interests of all customers in price competition.

We prohibit uniform delivered pricing because its consistent use has been shown to greatly aid in coordinating pricing in this poorly performing industry and, consequently, in reducing price competition. The introduction of variations in the terms upon which individual customers may purchase antiknock compounds should go far in disrupting the well-developed system of price-matching followed in this industry. Consequently, we do not believe it is essential to ban flatly advance price announcements, particularly in light of the advantages of forward ordering to customers. A ban on the "grace period" prior to the advance notice required by contract will eliminate the

device used by respondents to "test the waters" of a possible price increase. As described above, the pattern followed by the respondents quite consistently was the announcement of price increase by either Ethyl or DuPont sufficiently in advance of the 30 day notice period to allow the other major rival to **[96]** communicate whether it would go along with the increase and declare an identical price effective on the same day. All of the 24 price increases examined by the ALJ (*see* App. D to the Initial Decision) were initiated by Ethyl or DuPont. In each case a few days extra notice, in addition to the 30 days required by contract, was provided by the initiator. In each case, the other major rival responded to the initiator within the grace period and in almost every case, the two small respondents were able to respond within the grace period. In the great majority of cases, the response by the major rival was to match the initiator's increase. In the few cases where the response was to announce a different price, the initiator (or the company making the second move)[92] was able, within the grace period to readjust. Industry testimony, discussed above, confirms the key role of the "grace period." Because of the important role played by this "grace period" we limit our advance announcement ban to this **[97]** practice. This decision is within the discretion of the Commission to fashion remedies which are reasonably related to the unlawful practices.[93]

It is true that respondents may be able to avoid the impact of this restriction by developing a pattern of readjusting during the advance notice period. (*See, e.g.,* the argument in EAB at 41) For example, if Ethyl announced a price increase on January 1, effective in 30 days, and DuPont announced an identical change on January 3, effective in 30 days, Ethyl could readjust its effective date. At the very least, however, such a scenario complicates price-matching considerably because Ethyl may not learn of DuPont's new effective date immediately upon DuPont's announcement, thereby making it impossible to match it identically. Similarly, PPG and Nalco may delay somewhat in making a change, necessitating Ethyl's waiting an additional period before deciding to announce a new effective date. Presumably, DuPont could itself respond by revising its effective date, but the process is a good deal more complex. Combined with a ban on the exclusive use of uniform delivered pricing and the variations in prices introduced by periodic F.O.B. manufacturing **[98]** plant prices, we

[92] For example, in the case where both Ethyl and DuPont made simultaneous announcements, the one announcing the higher price typically adjusted.

[93] The general principles concerning the discretion of the Commission in fashioning relief were recently stated in *Sears Roebuck and Co. v. FTC,* 676 F.2d 385 (9th Cir. 1982). The Commission "has wide latitude for judgment [as to the proper remedy] and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612–13 (1946). Here we use our discretion to select the most narrow remedy consistent with the need to assure a likely return to price competition in this market.

believe the prospect of highly uniform prices moving in lock-step fashion is substantially reduced.

4.2 *Liability of PPG and Nalco*

The record shows that the dominant firms in this industry during the relevant period were Ethyl and DuPont, with an average combined share of about 70%. PPG, the third largest firm had an average share of 17.5% and Nalco's was 12.5%. (IDF 48) PPG and Nalco did not use certain of the challenged practices as consistently as Ethyl and DuPont, and both engaged in more extensive off-list pricing than the two larger firms. A substantial portion of PPG's sales—58% of all sales, including co-producer sales—were made at a discount off list. (IDF 66) Over 80% of Nalco's sales were made at a discount. (IDF 78) Together these two companies made virtually all the discounted sales in the industry during the relevant period. Consequently, in this section, we discuss considerations of liability with regard to PPG and Nalco, including any relevant differences between the two smaller firms and their larger rivals.

As to advance list price announcements, both PPG and Nalco regularly followed this practice. PPG's standard sales agreement included a commitment to give 30 days' advance notice as did Nalco's. (IDF 110–111) While some of Nalco's contracts did not contain the provision, its standard practice was to provide notice. While it is true Nalco did not provide over 30 days' notice, it did not do so because it never functioned to initiate a change in industry list prices and consistently waited until [99] after the first and second pricing move (if any) before following the price leaders. As to press announcements, PPG and Nalco followed the same practice of releasing their new list prices to the business press. There was no significant difference among respondents in this regard.

Both PPG and Nalco quoted list prices on a uniform delivered basis. Nalco argues that, because of its extensive discounting off list, and because list prices were quoted on a uniform delivered basis, most sales were not made on this basis. On the other hand, all Nalco sales at list were on a delivered basis, and all discount sales were made on a delivered basis. The record discloses no instance in which Nalco quoted a price on an F.O.B. seller's plant basis or explicitly reduced prices because of lower freight costs. Thus, a more accurate characterization is that Nalco typically discounted, but all list prices and the basis for all discounts were uniformed delivered prices.

Not all respondents used a most favored nations clause consistently. PPG's standard contract did not have the clause and it used it infrequently. Nalco used it in a minority of cases.

In determining the significance of PPG and Nalco's deviation from

the more rigid patterns of their larger competitors, we are concerned with whether the practices followed by them contributed in a significant way to the anticompetitive pricing performance of the industry and whether an order against them is in the public interest. In assessing these considerations we are mindful of both the practical future effect of any order as well [100] as equity among respondents. For example, it is possible that either Ethyl or DuPont could be allowed to engage in any of the challenged practices in the future with no harmful effect as long as all other industry members are banned. This anomalous result, if followed in issuing an order, would lead to an arbitrary and inappropriate application of the Commission's authority, however, and must be avoided. Consequently, the core question is whether any of the practices engaged in by PPG and Nalco contributed to competitive harm set out in the record and whether there is a meaningful possibility of recurrence in the absence of an order. For the reasons discussed below, we believe liability should be found for both Nalco and PPG, but we also conclude no order provisions are warranted as to either company.

As for use of most favored nations clauses, the ALJ did not find Nalco liable for use of these clauses, and the complaint did not allege PPG used them. Nalco did not use the clauses as consistently as did Ethyl and DuPont and the record does not support a finding that the use of these clauses by Nalco had a significant effect on the overall pricing pattern.

We understand the ALJ to have issued an order prohibiting most favored nations clauses for PPG and Nalco on the theory that they may have difficulty competing unless they are able to remove them unilaterally from their contracts despite his finding that their use was not significant. (IDF 166, 152) Although there may be circumstances under which an order provision based on this rationale is appropriate, we decline to do so here, in large part [101] because there is no indication in the appeal briefs of either Nalco or PPG that they believe such an order provision is in their interest.

The participation by PPG and Nalco in the rigid pricing patterns followed by the entire industry, however, justifies a finding of liability for the use of uniform delivered pricing. Neither company broke the pattern of quoting identical delivered list prices during the relevant time period. Neither attempted to restrain a list price increase by failing to follow the pricing leaders or by quoting list prices on other than a delivered basis. Moreover, it is clear that Ethyl and DuPont paid attention to the price moves of the two smaller companies and, particularly in the case of PPG, were not certain that a coordinated pricing move had been successful until PPG had responded. On the other hand, neither initiated a price increase and, consequently, their

use of "grace periods" in advance of contractually required notice was of marginal significance.

As in the case of PPG, we conclude Nalco's discounting was sufficiently restrained so as not to upset the prevailing market equilibrium. It is true that Nalco and PPG have introduced some competitive element into the market. However, for purposes of determining liability, the question is not whether these respondents should be punished or rewarded for pricing restraint but whether their practices contributed to anticompetitive price uniformity. This record demonstrates that they did.

We do not conclude, however, that the public interest requires placing Nalco or PPG under the requirements of a cease [102] and desist order. As discussed further below, PPG plans to withdraw from the industry within a few months of the beginning of 1983. The new industry structure—likely to remain stable for the foreseeable future —will consist of two dominant firms and one smaller firm. Nalco never initiated a price increase during the relevant period and has consistently followed a strategy of matching the industry leader's list prices while making the great majority of its actual sales at a discount from list. It is unlikely that Nalco will adopt a strategy of initiating price increases in the future, and, consequently, an order provision barring use of pre-contract announcements, such as we include in our order applying to Ethyl and DuPont, is unnecessary.

As for uniform delivered pricing, it is true that Nalco has not deviated from setting list prices on this basis but, if Nalco's pattern of discounting is continued, most of its sales will actually not be made at list price. By far the primary influences in stabilizing and coordinating prices at supracompetitive levels have been the two dominant firms. An order which requires these two firms to offer products on an F.O.B. plant basis will likely eliminate the influence of delivered pricing in stabilizing prices at supracompetitive levels, making such an order provision against Nalco less necessary. A further consideration is that, for the reasons discussed below, we do not enter an order provision against PPG and, therefore, we are less inclined to issue an order against the single remaining non-dominant firm in this industry. [103]

4.3 *PPG's Motion to Dismiss*

Subsequent to oral argument, PPG filed a motion to dismiss the complaint as to it on the grounds that it planned to discontinue production of antiknock compounds on December 31, 1982 and to withdraw completely from the industry a few months thereafter. PPG attached affidavits to its motion from responsible corporate officials attesting to these and related facts. PPG argued that the imminent

withdrawal from this industry made the proceeding moot as to PPG and precluded a determination that an order against it would be in the public interest. Complaint counsel oppose the motion on the grounds that: 1) it is premature to consider a claim of mootness until PPG has actually withdrawn from the industry; 2) PPG has failed to show wrongful behavior cannot reasonably be expected to reoccur; and 3) there is a "compelling public interest" in resolving the legality of PPG's conduct.

Complaint counsel do not question the factual premises of PPG's motion—that it will completely withdraw from the industry within a few months of the beginning of 1983. Consequently, for purposes of our consideration of PPG's motion, we accept this premise as correct. However, a stated intention to withdraw from an industry, or even an actual withdrawal, does not necessarily require a dismissal of a complaint or preclude entry of an order because, *standing alone,* these developments do not insure that there is no "cognizable danger of recurrent **[104]** violation . . ."[94] Order provisions may be appropriate even if the respondent has ceased production in the industry which was the focus of the complaint.[95] An order may be appropriate if the practices which are the subject of the order may be employed in other industries or where re-entry is a reasonable possibility.

The fact that a particular respondent is clearly abandoning an industry is more significant, however, when there is no real likelihood of it re-entering the industry and when the order provisions under consideration apply only to practices in that industry. In this case, the statements of company officials, the decline in demand for antiknock compound, resulting from developments in government regulation, and the existing capacity of the remaining industry members show re-entry is highly unlikely.

A further consideration in concluding that an order against PPG is unwarranted is that, like Nalco, PPG's conduct has not been nearly as central to the overall industry pricing pattern as that of the dominant firms. PPG never initiated a pricing increase during the relevant period and most of its sales, including co-producer sales, were at a discount. PPG's withdrawal from the industry and the less compelling need for an order, compared to the considerations applicable to Ethyl and **[105]** DuPont, lead us to conclude an order against PPG is not required by the public interest.

4.4 *Mootness*

In their appeal briefs respondents argue that the case is moot because the limited life expectancy of the industry makes relief un-

[94] *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953).

[95] *See National Lead Co. v. FTC,* 227 F.2d 825, 839–840 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1956).

necessary. Further, they say that price competition has improved during the relevant time period.[96] The ALJ found that a significant market for these products would continue at least through 1990. (IDF 43) He also found that the market may stabilize at an annual level of about 300 million pounds if heavy-duty trucks are exempt from EPA restrictions. (IDF 43, 45)

Subsequent to oral argument, DuPont filed a motion to dismiss, alleging developments since the record closed provided additional evidence that the public interest would not be served by continuing this proceeding. These new developments consist of an action by the Environmental Protection Agency to further reduce the permissible use of antiknock compound for environmental reasons. DuPont makes the allegation, unrefuted by complaint counsel, that in October 1, 1982, EPA promulgated new regulations which will reduce demand for antiknock compounds from 260 million pounds in 1985 to 90 million pounds in 1990. The [**106**] current price for antiknock is $1.07 according to DuPont (see memorandum supporting the motion at 6), and, consequently, total market sales will decline to something above $90 million by 1990.

DuPont's essential factual assertions are uncontested by complaint counsel and, for purposes of ruling on its motion, we take them as true. We note at the outset that DuPont does not contend that the market for antiknocks will soon disappear completely. Its principal contention appears to be that total industry production now and in the near future is so insignificant in size that the public interest could not be served by a Commission order. An industry with sales ranging from $260 million downward to $90 million for the coming 7 years is hardly insignificant, however. DuPont has pointed to no case where an industry of this size has been deemed too small to justify a Commission order.

DuPont also argues that the current "value" to buyers exceeds the price at which antiknocks are sold. This argument is based on the affidavit of a company official attesting to a purchase of an entitlement for a price suggesting the actual "value" to the buyer is worth more than twice the alleged market price. Even if certain buyers were willing to pay more for antiknocking compounds in certain quantities than prices at which they were offered, we could not conclude that the prices were equivalent to marginal cost or, more generally, that the market was performing competitively.

A more difficult question is whether declining demand may create

[96] An argument that market conditions have changed sufficiently to obviate the need for relief should be distinguished from the defense that the challenged practices were abandoned. We understand respondents to argue that a defense of abandonment could apply to press releases because these were generally halted before they were aware of the Commission's investigation leading to this proceeding. Because we do not find liability for issuance of press releases we do not address the possibility of an abandonment defense.

such excess capacity that price competition will be [107] stimulated. In this regard, we should recall the possible effects of excess capacity on industry behavior. First, excess capacity discourages new entry and in this sense contributes to the stability of uniform, supracompetitive pricing. Second, excess capacity may create additional incentives to collude or price interdependently in order to preserve profits in a period of declining demand. Finally, it may create incentives for discounting by encouraging one or more industry members to expand output and market share by aggressive pricing.

Respondents point to this last factor, and what they argue to be increased price competition, as evidence of a healthier competitive environment. The ALJ rejected this argument. After examining the level of discounting, profit levels and other factors, and how they may have changed in the recent past, he concluded that the evidence did not support a finding that the market had changed so substantially that relief was unnecessary. For example, market shares have remained relatively stable through the first half of 1980. (CX 2073; REX 324A–§17) Ethyl and DuPont's profits have remained relatively high through 1979. (IDF 163; IDF App. J)

As to changes in the level of discounting, complaint counsel's expert witness, Dr. Hay, agreed that there was some improvement in the level of competition during the relevant time period, primarily attributable to the decline in demand. (Hay, Tr. 3863) However, he also testified that prohibiting the [108] challenged practices in the future would be likely to "improve the vigor of competition or the speed with which that vigor is achieved." (Hay, Tr. 3837)

The fact that there were some price reductions during 1979 and 1980 during a period of falling demand illustrates that the industry was not totally immune to market forces of supply and demand. However, the fact that prices fell while costs were generally increasing (Robinson, Tr. 1230–31)—and profits still remained high—is a good indication of the degree to which prices were maintained at supracompetitive levels before the limited increases in price competition.

We do not conclude from these limited changes in market performance, however, that the industry conditions have so markedly changed that relief is not warranted. There has been no new entry and there is likely to be none.[97] PPG's stated intention to withdraw from this industry changes the industry structure to an even more concentrated oligopoly, dominated by the two larger rivals.[98] Market

[97] PPG, for example, relies upon the ALJ's finding of high barriers to entry in supporting its motion to dismiss. DuPont's motion to dismiss is predicated on an assumption of a declining entry, a condition consistent with our assumption of no significant new entry.

[98] PPG's production capacity will not be sold to an existing competitor or potential entrant, but will be sold for scrap. Reply of Respondent PPG Industries, Inc., to Complaint Counsel's Memorandum of Opposition to Motion for Dismissal of PPG, Dec. 21, 1982 at 2.

shares have remained relatively stable and profit levels remain relatively high. While there have been limited price decreases, a decrease in [109] price and profit levels does not preclude a finding of continued anticompetitive effects of the challenged practices. (Hay, Tr. 4385–86; Mann, Tr. 5583–84) In fact, the only substantial change in industry conditions—sharply declining demand—will be negated if demand stabilizes at a lower level. In that event, industry conditions could reach a new equilibrium at a reduced level of output with the same poor competitive environment as at the beginning of the relevant period.

In short, we do not believe the limited evidence of a healthier competitive performance during the recent past, primarily resulting from a decline in demand, or developments in government regulation which will further reduce demand warrant a finding that relief is unnecessary. This change does not represent the type of major structural change that negates the assumptions upon which the findings of anticompetitive effects are based.

4.4 *Vagueness of the Standard*

Respondents argue that Section 5 was not designed to address practices which are neither collusive nor monopolistic. In addition, they assert that there are compelling policy reasons why Section 5 should not be used to reach respondents' conduct. As discussed in Part 1 of the opinion, the Commission believes that both Congressional intent and subsequent court interpretations of Section 5 provide a clear legal basis for the condemnation of practices that are shown to harm competition, such as those challenged here. Moreover, we reject the assumption that anticompetitive practices that exist without the [110] benefit of an agreement, should not be subject to Section 5 because the legal standard is too vague.

Whenever conduct is examined for a potential antitrust problem other than limited *per se* violations, a detailed analysis of a number of factors is required. For example, conduct alleged to be monopolistic or an attempt to monopolize, in violation of Section 5 or Section 2 of the Sherman Act,[99] is analyzed in the context of an industry's structure and performance as well as the purpose and effect of the questioned conduct.[100] Likewise, in the areas of exclusive dealing and territorial restrictions, when agreements are scrutinized under a rule of reason for a violation of Section 5 or Section 1 of the Sherman Act, similar factors are considered.[101] Thus, the simple admonition to

[99] *See, e.g., Borden (Real Lemon),* 92 F.T.C. 669 (1978), *enforced, Borden, Inc. v. FTC,* 674 F.2d 498 (6th Cir. 1982).

[100] *See, e.g., E.I. DuPont De Nemours & Co.,* 96 F.T.C. 653, 745 (1980) (complaint dismissed).

[101] *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961) (requirement contracts); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977) (territorial restrictions); *Beltone Electronics Corp.,* Docket No. 8928 (complaint dismissed, July 6, 1982) [100 F.T.C. 68] (territorial restrictions).

"avoid agreements" is often of little assistance to practical business decision-making in avoiding conduct which may be judged unlawful under a rule of reason.

Our objective in the analysis of this matter has been to articulate a clear and straightforward legal standard that will enable business and antitrust counsel to conduct a manageable evidentiary inquiry that will provide a degree of certainty and [111] guidance as to whether certain practices violate Section 5, by facilitating price uniformity or other anticompetitive coordinated conduct.

In summarizing the standard we have applied here, it is useful to restate the steps in our inquiry. First, we examined the structure of the industry to determine if it was susceptible to practices which might facilitate anticompetitive interdependent conduct—in this case uniform, supracompetitive pricing. We found extremely high concentration, high barriers to entry, a homogeneous product, inelastic demand, in addition to other factors indicating the industry is prone to interdependent pricing. Second, we assessed the performance of the industry to determine if it was consistent with the poor competitive performance that would be expected from this market structure. We found relatively high profits, prices in excess of marginal cost, relatively stable market shares, rising prices in the face of sluggish demand and excess capacity, limited discounting, highly uniform prices, lock-step changes in prices, along with additional factors indicating poor competitive performance. Finally, we examined evidence that the particular challenged practices actually had an effect on significantly reducing price competition. This evidence included testimony and other statements by industry officials and customers, an examination of the use and nature of the four practices, expert testimony and accepted economic theory and scholarly analysis. We found that there was a close relationship between three of the challenged practices and the pattern of pricing observed in this industry, [112] and we concluded that it was highly unlikely that pricing would have occurred in such a non-competitive fashion in the absence of these three practices. Finally, we examined the possible procompetitive justifications for these practices.

We disagree with the arguments put forward by respondents that a prohibition of particular facilitating practices which are shown to have made a substantial contribution to coordinated pricing creates an unduly vague standard of unlawful behavior. We emphasize that we have not found coordinated pricing itself to be unlawful, only specific practices which are shown to promote it. Professors Areeda and Turner have pointed to problems in identifying and prohibiting interdependent pricing by oligopolists:

. . . interdependent non-competitive pricing, devoid of any additional elements of collusion, does not lend itself to treatment as an unlawful conspiracy. Not only is an injunction against "agreement" insufficient, but it is impossible to formulate a more specific injunction that is both judicially [113] administratable and consistent with the rules governing monopolists.[102]

In contrast, however, Areeda and Turner conclude that particular practices which facilitate coordinated pricing may be prohibited:

No serious practical or logical problems are encountered in enjoining individual oligopolists from quoting delivered prices only . . . To be sure, such injunctions run beyond a simple prohibition against "agreeing" on such matters, because more specific direction is necessary to assure termination of the illegal action, but they are as readily enforceable.[103]

Here, we do not face the difficult issue of determining under what circumstances parallel use of practices which results in coordinated behavior may constitute an agreement for purposes of Section 1 of the Sherman Act. Instead, we believe a more [114] manageable task and one that presents less conceptual difficulties is proscribing such practices as unfair methods of competition. This approach also has the advantage of not extending liability to private causes of action, resulting in treble damage liability, or creating a prima facie case in a private treble damages action.[104] We do not take the view that Section 5 can be used to prohibit any practice if doing so could improve competition to any extent. Consequently, we do not view any practice that theoretically reduces uncertainty about competitors' likely reactions to pricing moves as unlawful. Here, however, we are faced with an industry exhibiting strikingly poor competitive structure and performance and where the evidence shows particular practices have contributed to consistent uniform, supracompetitive pricing. Not only has certainty as to competitors' prices been increased substantially but the industry exhibited a consistent pattern of price matching, including price leadership by the two industry leaders, a well-devel-

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[102] Areeda and Turner, *supra*, Vol. III at 362. On the other hand, Posner argues that economic evidence in price-fixing cases may allow a finding of violation based on tacit collusion without evidence of actual communication. Posner, *Antitrust Law: An Economic Perspective* 76 (1976). As to feasibility of banning specific individual practices, we note that a relatively recent Justice Department consent decree prohibits two producers of heavy electrical equipment from engaging in a number of practices which are related to price coordination. *U.S. v. General Electric,* 1977 Trade Cas. ¶61,660 (E.D. Pa.). *See also FTC v. National Lead Co.,* 352 U.S. 419 (1949), upholding a Commission order enjoining individual use of delivered pricing practices.

[103] Areeda and Turner, *supra*, Vol. III at 362. Posner also agrees that "basing-point systems should be enjoined under Section 1 of the Sherman Act regardless of whether there is proof of actual agreement, because the plain purpose of such systems is to foster monopoly pricing." *Antitrust: Cases, Economic Notes and Other Materials* 135 (1974). Thus, these divergent schools of thought as to the proper analysis of oligopoly pricing agree that certain practices which facilitate coordinated pricing should be enjoined, without traditional evidence of agreements, even though both views consider the prohibition can be based upon a finding of a Section 1 conspiracy.

[104] Congress has recently enacted the Export Trading Company Act which provides a limited private cause of action based upon the FTC Act. Pub. Law 97–290 (1982). While there have no judicial interpretations under this act, we believe the limitations of the action make it unlikely that private actions could engender substantial additional business uncertainty as to use of facilitating practices.

oped system for announcing price by "testing the waters," a response by the other major industry members, and subsequent falling into line by the two smaller competitors.

In such a case, practices which contribute significantly to reducing competition with no offsetting procompetitive [115] justifications and which are closely analogous to recognized violations of the Sherman Act are clearly within the scope of unfair methods of competition.

5. *Remedy*

The ALJ entered an order dealing with the four challenged practices. We modify this order in a number of respects for the reasons we have discussed as well as those cited below. Complaint counsel have also appealed the ALJ's order in some respects. Their appeal is dismissed to the extent inconsistent with the order we have entered.

As discussed above, we do not agree with the ALJ that the order should prohibit all respondents from announcing to actual or potential customers the price of antiknock compound in advance of its effective date. In addition, we reject the ALJ's inclusion of a provision prohibiting communication of price information to other respondents except in connection with a sale to or purchase from another respondent.[105] We believe that a ban on the announcement of a price change in advance of that required by contract with customers, combined with other order provisions, is likely to disrupt the coordinated pricing practiced in this industry. [116]

Our order prohibiting price change announcements in advance of the period required by contract does not violate the First Amendment. This restriction constitutes a narrow limitation on one type of commercial speech which has been shown to result in substantial harm to competition. We believe the restriction is as narrowly circumscribed as possible, consistent with remedying the practices found to harm competition. Consequently, this limitation meets the test for permissible limitations of speech stated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[106]:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest assert-

[105] In this connection, we deny complaint counsel's appeal of the ALJ's decision not to ban interproducer sales. Complaint counsel's theory is that interproducer sales convey price information which can facilitate anticompetitive price matching. We do not believe this limited exchange of price information will be significant in the context of other order provisions.

[106] 447 U.S. 557 (1980).

ed, and whether it is more extensive than is necessary to serve that interest.[107]

In *National Soc. of Prof. Engineers v. U.S.*,[108] the Court upheld a ban on a professional association's adopting certain opinions, policy statements, or guidelines. Despite a claim that the ban was constitutionally impermissible, the Court stated such prohibitions may be an "unavoidable consequence of the [117] violation."[109] The question is whether "the relief represents a reasonable method of eliminating the consequences of the illegal conduct."[110] We believe this narrow limitation on respondents' commercial speech is reasonable in view of the prior history of anticompetitive effects and the limited burden on respondents' commercial speech in complying.

As discussed earlier, we vacate that portion of the ALJ's order which barred communications to the press of price changes for 30 days following the effective date of the price change. As we noted above, the record is not persuasive in showing that announcements to the press significantly contributed to uniform, supracompetitive pricing beyond that accomplished by announcements to customers. However, we extend the proscription on price announcements in advance of the contractual period to include a prohibition of advance announcements to anyone not in respondent's employ or under contract in connection with selling antiknock products,[111] including press, to avoid respondents' simply using alternative ways of communicating price information in advance of contractual notice requirements. We do include [118] provisos for conveying price information in negotiations or to governmental bodies or by virtue of governmental process which might otherwise violate the order.

Our order also permanently prohibits the use of most favored nations clauses by DuPont and Ethyl but does not apply to PPG and Nalco contracts. The permanent ban is limited to Ethyl and DuPont because of their greater use of the clauses and the more significant effect their use of them was shown to have.

We have also included provisions prohibiting use of uniform delivered pricing unless respondents provide an option to purchasers to buy on an F.O.B. manufacturing plant basis. This was the approach taken in *Boise Cascade*[112] and *Martin Marietta Corp.*.[113] We decline to include the ALJ's additional provisions prohibiting the use of a formula which "systematically" matches the cost of any other produc-

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[107] *Id.* at 566.

[108] 435 U.S. 679 (1978).

[109] *Id.* at 697.

[110] *Id.* at 698.

[111] This provision is included to allow respondents to communicate price information in advance of the contractual date to persons, not in respondents' employ, who are nevertheless under contract to assist in marketing or sales, *e.g.*, independent sales representatives, printing companies who must publish price lists, or the like.

[112] *Boise Cascade Corp., supra*, 91 F.T.C. at 109–10;

[113] *Martin Marietta Corp.*, 88 F.T.C. 989 (1976) (consent order).

er or equalizes the cost to customers quoting uniform charges to customers not similarly situated. Further, we decline to accept complaint counsel's proposal to ban any quotations on a delivered price basis. We believe it is enough to disrupt any pattern of price matching to allow any purchaser to buy on an F.O.B. mill basis. The variations introduced into the total prices charged to customers by a certain number of transactions on an F.O.B. mill basis, along with a prohibition on announcements in advance of the contractually required period and most favored nations [119] clauses, should effectively prevent price-matching. This more limited approach also avoids the ambiguities and enforcement difficulties which would follow from including the ALJ's or complaint counsel's approaches to delivered pricing.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III

Today the Commission embarks on a bold new adventure to the frontiers of antitrust law, clearing no path for those who follow, and leaving no signposts to guide the inexperienced traveler. I fear that such a journey is fraught with peril for both the explorers and for those required by law to follow the trails we blaze. I therefore decline to join the majority, and hope that the future provides a compass to guide our way along the uncharted path the Commission pioneers.

The Commission's decision creates a new antitrust cause of action that, while construed by the majority to be limited to the Commission's enforcement of Section 5 of the FTC Act, may nonetheless alter radically the scope of permissible business practices available to firms in so-called oligopolistic industries. Because I fear the implications of today's decision are potentially both far-reaching and harmful to competition, I must respectfully dissent. And, because of the many troubling aspects of the majority's lengthy opinion, I feel further compelled to abandon the cardinal virtue of civilized dissenters—brevity.

I. INTRODUCTION AND SUMMARY

In essence, the majority holds today that practices adopted unilaterally by individual firms in an oligopolistic industry may constitute "unfair methods of competition" in violation of Section 5 if such practices "facilitate" interdependent behavior among the oligopolists, even absent any collusive, monopolistic, or predatory [2] conduct. (Maj.Op. at 3, 28–29.)[1] In applying this new legal standard, the majority finds that all four U.S. producers of lead-based antiknock com-

[1] The following abbreviations are used in this opinion:

Maj.Op. - Majority Slip Opinion
ID - Initial Decision Page Number
IDF - Initial Decision Finding Number
Tr. - Transcript of Testimony Page Number
RDX - Respondent Dupont's Exhibit Number

pounds ("antiknocks") have violated the antitrust laws by adopting—at different periods of time and for legitimate business reasons—differing combinations of three so-called "facilitating" practices. Specifically, the majority finds all four respondents—DuPont, Ethyl, PPG, and Nalco—liable under Section 5 for use of uniform delivered pricing. (*Id.* at 2–3, 91–92, 101–02.) In addition, DuPont and Ethyl are also found to have violated Section 5 by using advance notice of price increases and "most-favored-nation" contract clauses ("MFN clauses"), which require the seller to offer a lower price to all buyers if it is offered to any. (*Id.* at 3, 91–92).

Employing what it terms a "rule of reason" approach (*Id.* at 28.), the majority finds that the four respondents—which account for 100 percent of U.S. antiknock sales—have violated the "spirit" of Sherman Act Section 1's prohibition of conspiracies in restraint of trade, as enforced by the Commission through Section 5 of the FTC Act. They are held liable even though no agreement—explicit or implicit—was alleged or proven. Rather, the unilateral adoption by each respondent of one or more of the challenged practices is found to be an unfair method of competition under Section 5. The legal standard proposed as a basis for this finding of liability is that Section 5 empowers the Commission to find that practices, which otherwise may be lawful in and of themselves, may, when used at the same time by members of an oligopoly, facilitate a kind of interdependent behavior that leads to the anticompetitive result the framers of the Sherman and FTC Acts sought to prevent. [3]

In dissenting from the Commission's decision in this matter, I do not necessarily reject the general concept underlying the new cause of action created by the majority. At the outset of our review of this matter, I did not reject the idea that it may be both prudent antitrust policy and within the scope of this Commission's legal authority to establish an antitrust rule of law governing "facilitating practices" within an oligopoly. I envisioned such a rule as condemning "lockstep", long-term use by all members of an oligopoly of uniform practices that had no legitimate business reasons, and that could be proven to reduce the overall level of competition by facilitating reductions in industry output of a truly homogeneous product—reductions that could not be remedied either by an existing industry renegade, or by a destabilizing new entrant. While such a rule would face both formidable theoretical hurdles and practical problems of proof, the concept nevertheless seemed a plausible one.

The Commission's experience in deciding the instant matter has, however, served to heighten considerably my skepticism about the theoretical bases and practical utility of such a legal theory. Both the legal standard adopted by the majority and the manner of its applica-

tion to the record evidence here cause me to question whether antitrust prosecutors and adjudicators are sufficiently sophisticated to surmount the obstacles presented by such a theory. Simply put, can the Commission generate more benefits by invoking the theory correctly than the mischief it can create by applying it erroneously?

I need not reach this difficult question today. Rather, laying my skepticism aside and accepting the theoretical possibility that, as the majority contends, the "collusive result" can occur in the absence of collusion, I would nevertheless reject a finding of liability for any of the respondents in this proceeding. I would do so because: (1) the particular legal standard established by the majority may itself be anticompetitive and contrary to the goals of the FTC and Sherman Acts; (2) that standard is too vague and unpredictable to serve as an understandable guide to business that must follow it; and (3) the majority has applied its own standard incorrectly to the facts in this record. [4]

Before explaining further the basis for my dissent, several preliminary points bear mentioning. First, I concur in the majority's conclusion that respondents' (now-discontinued) use of press releases announcing future price increases does not violate Section 5. (Maj.Op. at 3, 65–68.) Second, while the majority merely "declines to adopt" the ALJ's conclusion of law (at ID 167.) that the remaining three challenged practices are unlawful as "unfair acts or practices" within the meaning of Section 5 (Maj.Op. at 3, 31.), I see no reason to pause there. I would go further and reverse the ALJ's gratuitous conclusion on this point. Although this alternative "unfairness" cause of action was (regrettably) pleaded in the Commission's 1979 Complaint (¶14), this case seems to me clearly to be an antitrust challenge focusing upon alleged harm to competition, not a consumer protection matter concerned with injury to individual consumers.

II. THE MAJORITY'S STANDARD MAY BE ANTICOMPETITIVE

The majority's standard may itself be anticompetitive because its focus is too narrow. It fails to capture the essence of a dynamic, competitive market. By focusing on price competition only—and almost exclusively on list-price competition—it ignores the most important elements of competitive rivalry in this and many other American industries. By finding successful entrants liable for using practices that buyers demand, the standard discourages entry into oligopolistic industries. By focusing on a period in which any incentive to expand and earn additional market share was severely constrained by government controls, the standard fails to allow a meaningful test of its inferences and ignores the historical bases for the challenged practices. By focusing solely on the motives and behavior of respondents,

it ignores the important influences of their customers, themselves potential entrants via backward vertical integration.

A. *The Standard Ignores Non-Price Competition*

A standard that focuses exclusively on price competition may be harmful because it ignores other forms of competition that buyers value and that can shape a competitive result. For many years now, many economists have rejected the narrow view that only [5] prices should matter in assessing competition. As Joseph Schumpeter said more than three decades ago:

> Economists are at long last emerging from the stage in which price competition was all they saw. As soon as quality competition and sales effort are admitted into the sacred precincts of theory, the price variable is ousted from its dominant position.[2]

The record here strongly indicates that in the antiknock industry the dominant form of competition is, in fact, along non-price dimensions. These include especially the provision of services related to the safe handling and the safe and efficient use of highly toxic and explosive liquid compounds in the production of high-octane leaded gasoline. Specifically, the ALJ found that safety services are provided because of the "explosive and toxic nature" of the product. (IDF 91.) In addition, complaint counsel's economist expert testified that some of those services are "almost an inevitable part of the [antiknock] product." (IDF 210.) One of the respondents attributed a 35 percent sales gain to ten important customers in 1975 to services it had rendered that year. (IDF 98.) Moreover, there is evidence that the leading firms "literally buried" their customers with services. (IDF 90; *see also* IDFs 91, 99, 102, and 151.) Further, the ALJ found that "the furnishing of services played a significant role in the competitive rivalry between the antiknock suppliers" (IDF 151.), and that "the record is clear that refiners valued the services furnished by respondents and much antiknock business was awarded based on services." (ID 140; *see also* Testimony of Complaint Counsel's Economist Expert, cited at IDF 210.) Remarkably, the majority concedes that this case involves "a market with an emphasis on service rather than price competition" (Maj. Op. at 38.), but ignores the implications of this fact throughout the remainder of its analysis. (*See, e.g., Id.* at 39: "The heart of this case is the need to properly analyze *pricing* behavior in the market for these products.") [6]

Economic theory makes clear that such non-price competition cannot be ignored in assessing competitive performance. As Adam Smith noted in his classic treatise:

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[2] J. Schumpeter, *Capitalism, Socialism and Democracy* 84 (1950).

In a free trade an effectual combination cannot be established but by the unanimous consent of every single trader, and it cannot last longer than every single trader continues of the same mind.[3]

In this industry the product *cum* services—the antiknock product "package"—varies substantially among the four respondents. One respondent provides very few services internally, hiring outside consultants to provide free advice on matters of health and safety and efficient use of antiknock compounds. (IDF 96.) Another respondent furnishes most of its services through "inhouse expertise", such as direct assistance in designing and building customers' plants. (IDF 91.) Another provides computer programming assistance and training of refiners' employees. (IDF 92.) Others innovated a "tolling" arrangement in which waste products from customers' refineries are recycled and used as "scavengers" to improve the "blend." (IDFs 32, 83; and ID 155.) Yet another respondent, in conjunction with a refiner, developed a new product—tetramethyl lead (TML). When blended with the existing tetraethyl lead (TEL) product, TML created new product arrays of varying TML/TEL blends, with varying product performance characteristics.

In addition, all four respondents compete with varied and varying billing arrangements, which they strenuously try to keep secret from their competitors. (IDFs 138 and 183.) All deliver antiknocks at older, lower prices after a price increase has gone into effect. (IDF 81.) This practice is so complex that the ALJ found it would take "a major accounting project" to determine the equivalent amounts of price discounts. (ID 139.) One competitor keeps the arrangements secret from its own sales personnel, issuing the concessions in credit statements to its buyers. (IDF 138.)

The ALJ's findings on this record also show that respondents do learn of their competitors' practices, but not always instantaneously or accurately. For example, [7] sometime in 1977 Ethyl learned (apparently for the first time) that DuPont had been (1) picking up invoices for customers' outside consultants, (2) giving away weigh tanks, and (3) shipping antiknock beyond effective dates at old prices. (IDF 141.) Ethyl also discovered that PPG was giving rebates for customers' outside consulting services. (IDF 141.) Sometime within the period 1975 to 1977, one refiner customer revealed to DuPont a special discount arrangement it had begun with Nalco as early as 1974. (IDFs 68 and 140.) Prior to this proceeding, none of the other three respondents even knew of Nalco's use of MFN clauses, and PPG could not confirm that its rivals used such clauses until the Commission's complaint in this matter did them the courtesy of removing that bit of

[3] A. Smith, *Wealth of Nations* 129 (1937 ed.).

"uncertainty." (IDF 136.) Also, Ethyl erroneously thought Nalco was selling some of its antiknock at F.O.B. prices. (IDF 137.) Both Ethyl and DuPont had difficulty monitoring the "multileg" transactions between PPG and Nalco in which they exchanged or sold TML and TEL. (ID 142.)

If such pricing and quasi-pricing arrangements were difficult for competitors to monitor, it was obviously even more difficult for them to discover the exact value of the numerous varieties of internal service arrangements (such as computer programs, employee training, refinery inspections, and so on). In short, these non-list price competitive arrangements not only benefit refiner-customers, but also make any restriction of output below competitive levels a highly dubious prospect in the antiknock industry. As one commentor observes:

> *Under contemporary, multi-vectored, dynamic competition, the probability of tacit collusion among a few producers is negligible because the decision variables are so numerous that no producer is able to anticipate the precise actions of his competitors. . . .* Clearly, measurement of the effectiveness of competition in a market requires an assessment of *all* vectors, and a summation of their competitive effects. The strength of competition cannot be assessed by confining attention to *prices.*[4] [8]

Yet, the Commission's decision effectively dismisses the record evidence of non-price competition as undesirable, and ignores its potentially destabilizing influence on any supracompetitive industry equilibrium. The majority's principal citation for such an approach (Maj.Op. at 43 n.60.) is a work by Professor George Stigler, in which, according to the majority, he concludes that "price competition is much more effective in increasing output and reducing profits than non-price competition . . ."[5] In fact, the remainder of the very paragraph cited by the majority makes clear that Stigler was referring to what he characterized as an "empirical judgment."[6] Stigler did not say that a competitive result would not occur where non-price competition is possible. Empirical research subsequent to his cited publication has demonstrated that it can.[7] Moreover, Stigler's analysis assumes the existence of a closed market and a collusive agreement. No such conspiracy was alleged or proven in this case.

As Professor (now Judge) Posner observed:

> [I]f other forms of competition—inventory, product quality, *service,* or whatever—are very important, the only effect of eliminating price competition may be to channel

[4] N. Jacoby, *Corporate Power and Social Responsibility* 140 (1973).

[5] G. Stigler, *Organization of Industry* 23–28 (1968).

[6] *Ibid.*

[7] *See, e.g.,* J.C. Miller III and G.W. Douglas, "Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market," 64 *American Economic Review* 657 (1974).

competitive energies into other, and costly, forms of competition.[8] (Emphasis added)

Or, to quote Professor (now Judge) Bork:

There is no difficulty in explaining the prevalence of product rivalry. Those who see in it the peculiar machinations of oligopolists overlook the obvious fact that consumers are sensitive to much more than price. Most products present a bundle of satisfactions, both functional and aesthetic; product rivalry is essential, particularly in complex products, if the variety of consumer tastes is to be satisfied effectively. Intense product rivalry, therefore, signals not lack of competition but its presence.[9] [9]

To adopt a legal standard that disregards these significant non-price aspects of competition—aspects that customers value and that are an integral part of an industry's competitive process—would seem to run directly *counter* to the intent of the authors of the FTC and Sherman Acts that the majority wishes to further. It is indeed ironic that the standard adopted by the majority would tell firms in oligopolistic industries that in the future they should focus their competitive activities on forms of competition more readily detectable by competitors (*i.e.,* list-price competition), thereby making anticompetitive arrangements—whether collusive or interdependent—more readily achievable.

B. *The Standard Ignores Discounting Off List-Price*

Beyond neglecting the many important types of non-price competition just discussed, the majority's myopic fascination with list-price movements also ignores an equally important characteristic of the antiknock industry. Although the majority characterizes off list-price discounting in this industry as "limited" (Maj.Op. at 51, 111.), the record evidence clearly shows that substantial discounting occurred during the "relevant period." The majority concedes that during the 1974–79 period, PPG discounted in about one-third of its sales, and that *a full 58 percent of PPG's antiknock sales (including co-producer sales) were made at discounts off list-price in 1979.* (*Id.* at 44, 98.) Nalco's pricing behavior was even more remarkable. As the majority are again forced to admit, *over 80 percent of Nalco's sales were made at a discount off list-price.* (*Ibid.*) These undisputed figures demonstrate that sales at list price for these two competitors were the exception, not the rule. Indeed, as the majority notes in discussing whether Nalco need be made subject to the Commissioner's order, Nalco made the "great majority" of its sales at a discount from list (*Id.* at 102.), and "[I]f Nalco's pattern of discounting is continued, most of its sales will actually not be made at list price." (*Ibid.*) [10]

[8] R. Posner, *Antitrust Law* 60 (1976) (hereafter cited as "*Antitrust Law*").

[9] R. Bork, *The Antitrust Paradox* 190–91 (1978).

With respect to DuPont and Ethyl, the principal form of competition chosen by these two largest antiknock producers was the provision of services and other non-price aspects. However, while the majority finds otherwise, the ALJ correctly found that DuPont and Ethyl did engage in several practices that amounted to a price discount, such as allowing "forward ordering," late billing, and credit arrangements. (IDFs 80 and 88.) In addition, the record discloses at least one instance in which one of those firms in fact granted a discount to a refiner customer over most of the "relevant period". (*See* Maj.Op. at 74 n. 75.)

The ALJ found that the respondents took "extreme measures to ensure off-list pricing information is kept strictly confidential" (IDF 183.), and to keep the "transactions prices" of such arrangements confidential. (IDF 138.) Further, notwithstanding the record evidence of aggressive price competition by the two smallest firms, the majority condemns the "participation by PPG and Nalco in the rigid pricing patterns followed by the entire industry" and states (remarkably): "As in the case of PPG, we conclude Nalco's discounting was sufficiently restrained so as not to upset the prevailing market equilibrium." (Maj.Op. at 101.) Whatever one may conclude as to DuPont and Ethyl, I simply do not believe that the record supports this conclusion as to PPG and Nalco. Once again, I find it ironic that the majority—so anxious to increase "uncertainty" in this industry—finds PPG and Nalco liable because their price-cutting was done secretly, rather than by lowering the published list-price. It is difficult to understand how the majority can square its finding of liability as to PPG and Nalco with its own statement: "It is familiar economic theory that the more complex and more hidden the form of competition, the more difficult is the achievement of coordinated, parallel behavior in an oligopoly." (*Id.* at 43–44.) One result of today's decision may well be that future discounting will occur more often on a list-price basis, where all competitors can more readily detect it and react, according each respondent greater certainty in setting its list-prices. [11]

C. *The Standard Is Too Broad Because It Ensnares PPG and Nalco, Who Were Procompetitive Factors in the Industry*

Perhaps the most disturbing implications of today's decision are raised by the majority's finding that PPG and Nalco are equally liable as this industry's two most successful firms, Ethyl and DuPont. Any lingering doubts about the inappropriateness of the legal standard adopted by the Commission today vanish when one examines the record evidence upon which this liability is imposed. Not only did these smaller firms engage in the challenged practices to a lesser

extent than DuPont and Ethyl, but the record demonstrates that their influence on the antiknock industry was markedly procompetitive.

The majority finds both PPG and Nalco liable only for using uniform delivered pricing. (Maj.Op. at 2–3, 100–01.) PPG was not even alleged to have used MFN clauses. (*See* Complaint ¶12(b).) The majority finds that Nalco used MFN clauses "in a minority of cases", and concludes (correctly) that "the record does not support a finding that the use of these clauses by Nalco had a significant effect on the overall pricing pattern." (Maj.Op. at 100.)

Moreover, the ALJ found that both PPG and Nalco have been "procompetitive forces" in the antiknock industry since they entered in the early 1960's (ID 161 n.24.), which includes the "relevant period." Even the majority is forced to admit that "It is true that Nalco and PPG have introduced some competitive element into the market." (Maj.Op. at 101.) Even placing all other considerations aside, a legal standard that imposes liability on the smallest members of an "oligopoly" who have been found to be aggressive procompetitive forces in both price and non-price dimensions discussed above—apparently because in the majority's view PPG and Nalco were not able to bring their industry all the way to the perfectly competitive model —simply sweeps too broadly. Whatever the arguments for finding the two largest respondents liable, I think it clear that the complaint against PPG and Nalco should be dismissed. [12]

I suspect it will be cold comfort to PPG and Nalco to discover that, although liable under Section 5, they are not subject to the Commission's order in this case. While the majority's new cause of action is ostensibly confined to Commission enforcement under Section 5, there is no assurance that private litigants will not try their luck at extending it to the Sherman Act. (This might be attempted under either a tacit agreement theory under Sherman Section 1, or as a conspiracy to monopolize theory under Section 2. Such an attempt would find support in the majority's lengthy discussion of why existing Sherman Act precedent involving tacit collusion supports a finding of unlawful conscious parallelism among oligopolists. (*See* Maj.Op. at 16–20.))

More important, in a very real and very significant sense, today's finding of liability as to PPG and Nalco may well engender anticompetitive consequences by the message sent to even small actors in other oligopolistic industries (and to firms contemplating entry into them). That message is that even if those relatively small firms are procompetitive forces and unilaterally and for sound business reasons adopt practices that their (larger) customers desire, they had best keep one eye on the FTC (and perhaps uninhibited private litigants) for a potential lawsuit.

In particular, today's decision may have the unintended effect of deterring entry into oligopolistic industries. Potential entrants (such as those in the position of PPG in 1961 and Nalco in 1964) will no longer be certain they may safely adopt the prevailing trade practices within the target industry, even if the practices are desired by buyer and seller alike and are adopted unilaterally. Oligopolies—where they do not result from government regulation—are usually able to persist only by virtue of significant scale economies or other efficiencies. It would be most unfortunate—and the height of irony—if the majority's actions today deterred new entry into such industries.

D. *The Majority's "Relevant Period" Is Inappropriate*

A legal standard intended to promote the interests of consumers and the objectives of competition policy should focus upon a time period sufficiently long to [13] constitute a meaningful, representative test of the competitive effects of the challenged practices, and to allow an assessment of their historical bases—whether anticompetitive or efficiency-related. The time period chosen and focused upon by both the ALJ and the majority as "the relevant period" (Maj.Op. at 1.)[10]—January 1974 to May 1979—does neither. Instead, the majority carves out a single (albeit important) five-and-one-half-year "slice" of the antiknock industry's nearly 60-year history in which special factors may account for the effects the majority finds objectionable, and from which it is not possible to determine either the purposes or actual effects of the challenged practices. Because the majority opinion is virtually silent on developments prior to the "relevant period," a brief historical digression is necessary.

1. The Challenged Practices Were Adopted Before Interdependent Behavior Was Possible

In 1924, Ethyl's predecessor corporation was formed to market TEL compounds produced under a patent monopoly controlled (indirectly) by the DuPont Corporation. In 1938, Ethyl began producing TEL itself. But until 1948 Ethyl remained the sole U.S. marketer of antiknocks. (IDFs 16–17.) The majority concedes that Ethyl adopted uniform delivered pricing in the 1930's while it was the sole antiknock producer. (Maj.Op. at 77.) Most-favored-nation clauses were also adopted unilaterally by Ethyl while it was the only producer (IDF 156.), as were advance price notices. (Maj.Op. at 55, 62.) In short, none of the three challenged practices were adopted as a result of any decisions by competing firms—conscious or unconscious—to restrict

[10] The majority opinion asserts that the Commission complaint alleges the challenged practices were followed "over an extended period." (Maj.Op. at 1.) In fact, the complaint is completely silent with respect to the duration of the alleged practices.

output or promote stability. Rather, as I discuss below in Part IV(C), they were adopted for reasons of efficiency and in response to customer demand. [14]

2. The "Relevant Period" Is Atypical And Unrepresentative

In addition, the history of this industry shows that the time period chosen as "relevant"—1974 to 1979—is, in fact, too short to draw any inferences of anticompetitive effects. It is possible that the claimed high prices and profits and stable market penetration cited by the majority (Maj.Op. at 36–39, 40–41, 47.) may all be attributable to the influences of government regulations alone. No such effects prior to the 1974–79 period are demonstrated by the ALJ's or the majority's findings.

From August 1971 to January 1974, federal price controls froze the price of antiknocks (at least for TEL). (RDX 332G.) In the meantime, as the majority notes, in 1973 federal environmental controls were promulgated that would ultimately result in a 90 percent reduction in antiknock industry demand, but with both the exact amount and timing of the reduction unclear. (Maj.Op. at 105; ID, Appendix C.) Originally, respondents believed the controls were to be phased in over a four-year period from 1975 to 1979. But numerous delays resulted in postponing the start until 1978, after which demand fell sharply. (IDFs 43–44; and ID, Appendix C.) One respondent, PPG, is currently in the process of exiting the industry. (Maj.Op. at 102–03.)

Thus, any tendency for prices or profits to rise in the 1974–79 period may be attributable to the substantial risk introduced by government regulations. In addition, the threat of impending extermination or near-extermination substantially weakened any desire to expand and achieve any significant additional market penetration in that period. (IDF 40.)

Finally, in many industries the expiration of price controls was followed by rapid price hikes, as firms subject to controls sought to compensate for years in which output prices were frozen.[11] [15]

In the period preceeding the start of the majority's "relevant period" there was significant entry, substantial volatility of market penetrations, stable or falling product prices, and the development of innovative products and processes. From 1948 to 1974, Ethyl's share fell from 100 to 33 percent of the market. From 1961 to 1974, DuPont's share fell from 50 to 38 percent, while Nalco had grown from nothing to 12 percent and PPG from nothing to 16 percent by the start of the "relevant period." (ID, Appendix C.) Meanwhile, from 1960 to 1974 the price of TEL rose by only 17 percent, and the price of TML actual-

[11] M. H. Kosters, *Controls and Inflation: The Economic Stabilization Program in Retrospect* 40–41 (Washington: American Enterprise Institute for Public Policy Research, 1975); M. and R. Friedman, *Free to Choose* 279–80 (1980).

ly *declined* by 10 percent. (IDF 52.) In sharp contrast, during this same period the overall producer price index rose by 57 percent.[12] During this same time frame, Nalco developed TML, and both Nalco and PPG developed new production processes for recycling oil refiners' waste products. (IDFs 32 and 83.) All four of the so-called "facilitating" practices challenged in the complaint were in fact in use by two or more respondents during this 1960–74 period. (*See, e.g.,* IDF 124.) The majority fails to explain why these practices did not "facilitate" supracompetitive price increases during this period. Presumably, the majority feels this 14-year period is simply not "relevant."

In sum, the majority has focused exclusively on a time period during which the "aftershock" of price controls rippling through the economy, coupled with the market disruption created by the impending environmental restrictions on leaded gasoline, combined to exert a profound effect on the antiknock market. The majority attributes all of the pricing and profit performance during 1974–79 to respondents' facilitating practices, and none to government intervention. It is readily apparent what serious mischief a legal standard can create when it permits prosecutors to establish a performance-based antitrust law violation upon evidence from a short, unrepresentative, and unusual time period that is viewed in isolation from the remainder of the industry's [16] history. Such a legal standard hardly seems consonant with the goals of competition policy.[13]

E. *The Standard Ignores Respondents' Customers*

The majority dismisses the actions and potential actions of respondents' customers—petroleum refiners—as irrelevant and "misguided." The basis for this approach is the majority's notion that refiners do not realize that the practices they have demanded of respondents help the refiners individually, but harm them as a group as industry output is allegedly restricted below competitive levels. (Maj.Op. at 75–76.)

The majority concedes—as it must—that respondents' customers are large, sophisticated, and aggressive firms, "many of whom did press for discounts", and that this fact cuts against their anticompetitive inferences. (*Id.* at 35.) However, it then proceeds to ignore the ramifications of this fact for its theory, saying only that it is "inadequate to change [our] overall conclusion." (*Ibid.*) Six antiknock buyers —Exxon, Mobil, Texaco, Gulf, Amoco, and Chevron—are among the ten largest U.S. industrial corporations. (IDF 19.) Many of these refin-

[12] *Economic Report of the President* 227 (1983). The Commission may take official notice of such regularly-prepared statistical compilations published by the federal government. FTC Rules of Practice Section 3.43(d), 16 C.F.R. 3.43(d) (1982). *See also* Fed. R. Evid. 201.

[13] It might be another matter if there were evidence that the industry had lobbied for the regulations in question. Such is not the case here.

ers are fully capable of integrating backward into the production of antiknocks if services were deficient, or if prices exceeded marginal cost—*i.e.*, if respondents' profits were excessive. This is more than a theoretical possibility. The ALJ found that five of the largest antiknock buyers jointly own the export market's largest producer, OCTEL. (IDF 37.) (Tariffs apparently preclude OCTEL from exporting into the U.S. in competition with respondents. (IDF 104.)) One such refiner provided technical and marketing assistance as well as financial help to facilitate Nalco's entry in 1964, and participated in Nalco's successful development of a new product, TML. Other refiners provided financing to both Nalco and PPG (then called Houston) in their inaugural years. (IDFs 50 and 139.) **[17]**

Thus, when the focus of the analysis is broadened to include the special nature of customers in the antiknock industry, a considerably different picture of the competitive process emerges. In spite of criticisms by some of complaint counsel's refiner witnesses concerning respondents' pricing policies, those refiners appear to be in large measure satisfied with and responsible for the practices they criticized. Many refiners demanded the challenged practices, and felt they saved them money. Much like advertising, refiners relied on the challenged practices to compare prices or to reconsider contracts. (IDFs 112 and 126.)

There were no barriers blocking refiners from entering themselves and taking away business from an unresponsive and uncompetitive antiknock industry. Even if such entry were less likely following the EPA's actions since 1973, the majority does not explain why entry was not feasible before the "relevant period." If prices were too high or services too low at any point in time, the refiners could not only play one seller off against another, but could threaten respondents' very existence in the antiknock market with backward vertical integration. That none of these potential entrants chose to do so at any point in time—especially today when a firm with 17 percent of 1980 sales is existing the industry and is destroying rather than selling its production facilities—is simply inconsistent with the cartel result. Perhaps the statement of one of complaint counsel's refiner witnesses, a purchasing agent for Exxon Corporation, explains best why refiners did not enter the antiknock market as producers:

> We think it's [respondents' antiknock fluid] a bargain. Even though we fuss at our vendors a lot, it really is a bargain for us as far as achieving higher quality at a lower price. (Steen, Tr. 3457.)

In sum, the record evidence in this case shows that the majority's legal standard disregards the role of respondents' customers, ignores

the history of the challenged practices, fails to consider the effects of non-price dimensions of competition, and, I believe, runs counter to the goals of this nation's laws on competition. If a standard of harmful interdependent oligopoly behavior is to be adopted, it should not be so narrow [18] and static that it permits inferences of harm which a broader, dynamic perspective would show to be, in fact, procompetitive and beneficial to competition and consumers. For these reasons alone, I cannot join in the majority's decision.

III. THE STANDARD IS TOO VAGUE AND UNPREDICTABLE TO SERVE AS A REASONABLE GUIDE TO BUSINESS BEHAVIOR

As the majority intimates, even if a particular legal standard is sound in theory, it may not be sufficiently simple and clear to serve as a guide for business behavior. No matter how conceptually elegant a theory, it is of no practical value if businesses cannot figure out what they are supposed to do and not do until after the fact. Yet this is precisely the result of the standard adopted in this case.

Under the cause of action created today, firms acting independently and adopting one or more practices for legitimate business reasons at the behest of their customers would become liable at some unknown time when some unknown combination of the practices used by an unknown number of the firms took place. Even firms not found to employ the practices in any objectionable way would be liable for, in effect, "hanging around the wrong crowd." The principal guidance provided by the majority would be a list of four objectionable structural and seven objectionable performance characteristics, with a proviso that "additional" features may be relevant as well. Most of those characteristics are as vaguely stated as the challenged practices, and many exist in both competitive and monopoly situations. (*See* Part IV(A), below.)

This is simply not an understandable rule of law. At best, it would add another dimension of regulatory risk and uncertainty to this and other industries' environments. At worst, it would actually deter beneficial, procompetitive behavior, for fear of triggering a Section 5 violation for unknown and unknowable reasons.

A. *The Standard Does Not Specify When the Challenged Practices Became Illegal*

The majority decision seems to imply that each of the challenged practices in and of itself may be legal—that it is a combination of the practices that is objectionable. [19] (Maj.Op. at 90–94.) Specifically, it allows that grace periods provided with advance price notification might be lawful if it were not for the practice of uniform delivered pricing. (*Id.* at 94.) It further concedes that MFN clauses might be

legal if it were not for the practice of advance price notification. (*Ibid.*) Finally, it admits that even then the practices might be legal if a different set of structural and performance variables characterized an industry. (*Id.* at 22, 24–27, 110.)

It is, of course, well and good to have a standard that is sufficiently flexible to allow reasonable behavior. Given that a standard is to be set, it should by no means make interdependent oligopoly behavior a *per se* violation. But there should be sufficient clarity to allow firms a reasonable certainty of liability under a knowable set of circumstances.

A standard should allow further firms in similar circumstances to predict when a set of practices adopted for legitimate business reasons in response to customer demand becomes an antitrust violation. Was Ethyl guilty of a Section 5 violation when it adopted each of the practices unilaterally? Or did they become a violation when DuPont entered in 1948, and subsequently sought to take away sales from Ethyl by adopting the same business methods Ethyl had found successful? Or did the practices become unlawful when PPG's predecessor (Houston Chemical Company) entered in 1961 and sought to take away sales from Ethyl and DuPont? (PPG gained 16 percent of sales within 13 years as DuPont, the sales leader, lost 12 points in that period.) Or did the illegality arise when Nalco entered in 1964 and gained almost 12 points over the next 10 years—all at the expense of the two leading firms, DuPont and Ethyl? (*See* ID, Appendix C.) To each of these questions, the majority provides no answer.

At no point does the majority explain when the violation was triggered. The most likely inference appears to be that liability followed the imposition of government regulations in the 1970's which threatened extermination of the industry and which, according to the majority's decision, practically eliminated the possibility of further **[20]** entry. (Maj.Op. at 33.) This is because the decision elsewhere states that it "would not expect such [pricing coordination] practices to have a significant effect unless barriers to entry deterred potential entrants from 'competing away' excess profits earned by firms with supracompetitive prices." (*Id.* at 25.) Since there was significant entry in the 1960's with substantial shifts in sales penetration, I can only infer that the decision finds that the violation occurred sometime during the subsequent period of government controls.

If that is the case, it should be so stated so that in the future potential violators will have a better chance of knowing *when* otherwise lawful practices may become a law violation. If it is not the case that government regulation triggered the violations found here, then the "relevant period" should be extended backward in time to deter-

mine precisely when the violation occurred, and with what effect on competition and consumers.

B. *The Standard Does Not Specify What Combination of the Practices Is Unlawful*

There are considerable uncertainties in the majority decision regarding potential liability for alternative combinations of the challenged practices. The clearest implication is that uniform delivered pricing is most objectionable to the majority. All four respondents are found liable for its use. (Maj.Op. at 2, 90, 93, 101.) The majority implies the other challenged practices could be lawful if it were not for uniform delivered pricing. (*Id.* at 94.) Further, the majority intimates that the truly objectionable aspect of advance price notification is the additional "grace period" over and above the notice period contractually required. (*See, e.g.,* Maj.Op. at 101.) Today's decision holds liable two firms—PPG and Nalco—whose only "hard core" challenged practice was uniform delivered pricing. (Nalco did not employ a grace period in conjunction with its advance notification contracts, and PPG did not utilize the grace period to initiate any price increases.) For the reasons discussed in Part IV(D), below, there is no basis in this record to infer anticompetitive effects from use of such delivered pricing by PPG and Nalco, or either of the remaining two respondents. **[21]**

DuPont and Ethyl are found to have engaged—unlawfully—in *three* of the challenged practices. Nalco is found to have used the same three practices, but to be liable for only *one* (uniform delivered pricing). PPG is found to have employed only *two* of the three practices, but to be liable for only *one* (again, uniform delivered pricing). I suspect it will be difficult indeed for firms operating in "oligopolistic" industries to sort all of this out into any meaningful antitrust compliance guidelines.

Moreover, a legal standard that implies that each of several challenged practices may be lawful by themselves, but then holds liable two firms on the basis of only one of the practices, is less than precise. At best, such a standard may make firms more cautious about entering oligopolistic industries in which one or more of the challenged practices are the prevailing terms of trade.

IV. THE FACTS IN THE RECORD DO NOT MEET THE PROPOSED STANDARD

Even if the majority decision's proposed standard were broad enough and clear enough to serve as a basis for imposing liability, no violation could be found on the facts in the record. The record shows that neither the structure, performance, nor conduct criteria of the standard are satisfied by the facts in this case.

A. *The List of "Objectionable" Structural and Performance Variables Do Not Support The Majority Conclusion*

The majority decision offers a list of objectionable structural and performance characteristics that are intended to resolve the vagueness problem, and to serve as the theory on the basis of which the inferences of anticompetitive effects may be drawn. The majority argues that the challenged practices can be inferred to be unacceptably anticompetitive (and hence unlawful) if they are associated with certain "structural" and "performance" characteristics. They identify five such structural characteristics: (1) high concentration, (2) high entry barriers, (3) a homogeneous product, (4) inelastic demand, and (5) "additional [structural] factors." They then designate eight performance characteristics: (1) "highly uniform" prices, (2) "lock-step" price changes, (3) "limited" discounting, (4) "stable" market shares, (5) "relatively high" profits, (6) price in excess of [22] marginal cost, (7) rising prices accompanied by both "sluggish demand" and "excess capacity," and (8) "additional [performance] factors." (Maj.Op. at 110–12.)

Each of the cited characteristics is subject to alternative interpretations in the context of almost any real-world industry situation. In addition, the categories labelled "additional factors" contain characteristics that are clearly procompetitive in the antiknock industry. I consider here certain of these structural and performance variables that the majority misinterprets in its analysis.

1. Structural Factors

a. *High Concentration*

It is undisputed that the antiknock industry is highly concentrated. It is also true that such concentration lends itself to an awareness that each firm's actions will influence those of its competitors and, ultimately, affects the industry equilibrium levels of price, services, and output. But this is true of all oligopolistic industries, irrespective of whether the practices challenged in this case are utilized. As one commentator observes:

> [O]ligopoly competition may be as virile as competition in an industry with a large number of small- or medium-sized firms. . . . It is immaterial that each oligopolist firm acts with awareness of its competitors as long as it makes its independent decisions on price, quality of product and service, research and innovation, cost and profit factors. . . . Again I stress that the courts have not condemned a mere oligopoly market power as a Sherman Act violation. The Supreme Court has distinguished genuine collusive conduct of oligopolists from mere conscious uniformity of business behavior arising from mutual awareness of common economic or business justifications in harmony

with independent self-interest.[14]

Or, more recently, as others observe: [23]

When there are at least two noncolluding firms in an industry, there is no clear-cut relationship between the number of firms and the degree of competition.[15]

b. *High Entry Barriers*

I heartily concur in the majority's conclusion that the practices challenged in this case cannot lead to supracompetitive results in the absence of effective entry barriers. (Maj.Op. at 25.) However, the majority's definition of an entry barrier is subject to question. As Posner points out, properly viewed, an entry barrier is not a high cost of entry. Rather, it is a high (long-run) cost that entrants must bear in excess of those costs incurred by existing firms.[16] In this case government price controls and environmental regulations weighed equally on all firms, present or potential. Thus, they are not entry barriers in the true economic sense. But even assuming EPA regulations make it unlikely any new firms will enter the antiknock industry, this "structural factor" was not present until the early 1970's. Thus, we must presume the challenged practices were lawful until that time. It follows that, under the majority's theory, the imposition of environmental regulations gave rise to an antitrust violation on the part of all industry firms and—in addition to mandating the medium-term demise of the industry—presumably required all four respondents to restructure their traditional business practices. [24]

c. *Homogeneous Product*

The record evidence amply supports the majority's conclusion that antiknock compounds of a given proportion of TML and TEL are identical. (Maj.Op. at 33–34.) However, the record also demonstrates that alternative mixtures of the two compounds (*e.g.,* 75/25 TML/TEL vs 25/75 TML/TEL) have different characteristics and different prices. (*See, e.g.,* IDF 7.) More important, the antiknock product was sold with essential safety services—services that varied substantially among the four respondents. Moreover, the record shows respondents

[14] S.C. Oppenheim, "The Sherman Act and Internal Company Growth," NICB Conference on *Antitrust in an Expanding Economy* 11 (May 16, 1962); *see also* R. Bork, *The Antitrust Paradox* 103–04, 163–97 (1978).

[15] E. Fama and A. Laffer, "The Number of Firms and Competition," *American Economic Review,* Vol. LXII, No. 4 (September 1972), p. 674. *See also,* M. A. Adelman, "Effective Competition and the Antitrust Laws," *Harvard Law Review* 1297 (September 1948); G. C. Archibald, " 'Large' and 'Small' Numbers in the Theory of the Firm," *Readings in the Economics of Industrial Organization,* edited by Douglas Needham (New York: Holt, Rinehart, and Winston, 1970), p. 168; H. Demsetz, *The Market Concentration Doctrine* (Washington, D.C.: American Enterprise Institute For Public Policy Research, 1973), p. 26; and J.M. Vernon, *Market Structure and Industrial Performance - A Review of Statistical Findings* (Boston: Allyn and Bacon, Inc., 1972), p. 117; J.S. McGee, *In Defense of Industrial Concentration* 129 (1971).

[16] *Antitrust Law* at 59, citing G. Stigler, "Barriers to Entry, Economies of Scale and Firm Size," *Organization of Industry* 67 (1968).

used varying credit terms and delivery dates.[17] (*See* Part II (A), above.) In short, the product—properly defined to include the associated services and delivery arrangements—is, upon close inspection, far from homogeneous. The majority's failure to recognize this explains its decision to ignore the numerous dimensions of price and non-price competition in this industry.

d. *Inelastic Demand*

The majority decision states that inelastic demand is necessary for the existence of supracompetitive prices and profits—to assure that any output restriction results in "price above marginal cost." (Maj.Op. at 25.) If this statement regards *industry* elasticity, it is simply wrong. As Posner observes, inelastic industry demand at the market price—which does prevail in the antiknock industry (IDF 42.)—is inconsistent with a monopoly result, and "is rather good evidence that the sellers are not colluding—at least, not effectively."[18] (This is because where industry demand is inelastic, joint marginal revenue would be negative.) If the majority means that *firm* demand curves are inelastic at the market price, it implies that they were acting irrationally, since marginal revenue would be negative. In addition, any inference of inelastic firm demand is inconsistent with the high degree of price sensitivity shown by buyers in the record. (IDF 27.) **[25]**

e. *Additional Structural Factors*

The most obvious "additional" structure factor is the undisputed presence of large, sophisticated, and aggressive buyers. As the majority admits, this cuts against any inference of anticompetitive conduct and effects. As previously indicated, this is a crucial factor in this industry, since buyers were the most obvious source of potential entry and could have integrated backwards into the antiknock industry if profits were really excessive.

The additional crucial structural factor needed to support the majority's legal theory (which the majority decision also cites but ignores) is that "price competition [must be] more important than other forms of competition." (Maj.Op. at 22.) As discussed extensively above, the existence of substantial non-price competition—such as the service element in the antiknock industry—substantially reduces the likelihood of anticompetitive effects. The record in this case bears that out.

f. *Summary*

Thus, the majority defines and applies three of its four structural

[17] For the proposition that differing delivery dates and credit terms can introduce "an element of heterogeneity", *see* J. Hirshleifer, *Price Theory and Applications* 337 (1976).

[18] *Antitrust Law* at 57.

prerequisites in a manner inconsistent with the proper economic meaning of these concepts. Moreover, it omits discussion of two others that point to an absence of anticompetitive effects. When properly analyzed, five of six important structural conditions are not met by the facts in this case. The product—*cum* services and off-list price dimensions of competition—is *not* homogeneous. *Industry* demand at the transactions price is inelastic, while *firm* demand is elastic. Price does *not* appear to be the most important dimension of competition in this industry. Customers *are* large, sophisticated, and aggressive. Although there are important tariffs, entry barriers are *not* high, as evidenced by the entry and successful expansion of two respondents in the period preceding the "relevant period." (This conclusion is bolstered by the fact that respondents' customers could (as they have in other countries) integrate backward into the industry.) The majority's single remaining "structural" factor—industry concentration—is itself the subject of intense **[26]** debate in the economic literature as to cause and effect.

2. Performance Factors

a. *"Highly Uniform Price" and "Lock-Step" Prices Changes*

It is clear that the majority views the uniformity of respondents' list-prices and their tendency to rise in so-called "lock-step" fashion as the heart of this case. (Maj.Op. at 51, 64, 80.) It emphasizes that, of 24 list-price increases during the "relevant period," 20 were identical and occurred for all respondents on the same day. (*Id.* at 48.) The basic problem with this notion is that, as the majority itself recognizes, prices tend towards uniformity in competitive markets as well as non-competitive ones. The decision seeks to resolve this dilemma by saying that it is not so much the uniformity of prices but the rapid speed at which respondents' prices adjust that demonstrates the asserted fact that prices are above competitive levels and that "price leadership" is involved.

First, I note the circularity of the claim that price uniformity (however defined) is anticompetitive because prices are above competitive levels and that prices exceed competitive levels because of price uniformity. Second, the existence of substantial service competition among respondents shows that pricing cannot be discussed in a vacuum. In this industry, any tendency for pricing to rise above marginal cost would be checked by competition along service and other non-price dimensions.

Third, the notion that "price leadership" and simultaneous movements in price provide the key distinctions between competitive and

supracompetitive markets is simply erroneous. To quote from a leading economics text:

> *All* prices in all markets are administered in the sense that each person decides at what price he shall sell (in the light of market demand) . . . The prices and sales of firms are interdependent. They watch each other closely and, like dogs chasing a rabbit, move together, even in those cases where there is no leader, simply because they seek the same quarry.

* * * * * * * [27]

> That the same firm is usually the first to make a price change which others almost always follow does not mean that the leader dictates prices to other firms, nor does it imply some tacit agreement not to compete with prices. It can attest to the lead firm's greater acuity and knowledge of market conditions.

* * * * * * *

> Simultaneity of price action or "dominance" by one firm is not evidence *for or against* the existence of *effective* collusive agreements. The number of sellers and the coordinated price-search process, whether it be simultaneous or lagging behind some apparent "price leader," are also irrelevant.[19] (Emphasis in original)

Or, as Posner observes:

> To be sure, there are dangers in pressing the "meeting-of-the-minds" approach too far. Suppose that a group of competing firms simultaneously experience an increase in the cost of some raw material that each one uses. In deciding how to respond to the common cost increase, each firm will consider the probable response of its competitors to the increase, since its ability to pass on the cost increase in whole or part to its customers by raising price will depend on the pricing decisions of its competitors. The process by which the firms arrive at the new equilibrium at a higher price may thus have elements of "tacit agreement." The process is not an anticompetitive one; yet if the firms explicitly coordinated their pricing in reaction to the cost change, the law would treat their agreement as illegal collusion—and rightly so, since there would be justifiable suspicion that the agreement was both unnecessary to smooth adjustment to the cost increase and motivated, at least in part, by a desire to raise the market price by more than the cost increase actually requires.
>
> This example shows that the law should not always equate tacit and explicit pricing agreements. Some degree of tacit coordination of pricing in reaction to external shocks, such as the increase in raw-material costs examined above, is inevitable and unobjectionable.[20]

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[19] A. A. Alchian and W. R. Allen, *University Economics*, 345–46, 356 (1971).

[20] *Antitrust Law* at 72. *See also* D. Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal," 75 Harvard L. Rev. 669 (1962).

In short, pricing uniformity is the inevitable result of open market processes and is consistent with either competitive or anticompetitive behavior and results. It is the expected condition in a so-called oligopoly such as the antiknock industry, with or without use of the challenged practices. [28]

b. *"Relatively High" Profits and Price Above Marginal Cost*

It appears there is simply a failure of proof on the claim that profits were excessive. First, the accounting method employed failed to use *current* costs (*see, e.g.,* IDF 166.), which are necessary for any inference that entry of equally efficient competitors is being deterred.[21] Second, as Posner notes, where costs vary among firms, the competitive optimum is where price equals cost for the *marginal* seller only.[22] And as Demsetz notes, differential profits among sellers are inconsistent with an anticompetitive situation.[23] PPG's 1978 reduction in capacity and its recent exit are scarcely consistent with price above marginal cost for the marginal firm. In addition, the accounting data cited by the ALJ show Ethyl's estimated rates of return before taxes are generally twice as high as those for PPG and Nalco for the "relevant period," with DuPont in between. (IDF, Appendix J.)

Moreover, as Posner also observes, "equality of price and (long-run) marginal cost is efficient only when the market is in an equilibrium, or stable, condition."[24] Such a description scarcely characterizes the antiknock industry during the "relevant period." Even as the market distortions caused by price controls were fading, those caused by environmental regulations were growing. Risk existed in the certain knowledge of near-extermination, with only the timing and pattern of the precipitous decline unclear. [29]

These facts—and the fact that at no time before, during or since the "relevant period" did any of the large oil company buyers attempt to integrate vertically into this industry—are inconsistent with the majority's finding of supracompetitive profits and performance in the antiknock industry.

c. *"Limited" Discounts and "Stable" Market Shares*

The majority's legal standard does not specify when, or in what order of magnitude, these measures are sufficient to rebut an anticompetitive inference. Moreover, the record indicates a non-trivial

[21] G. Benston, "The FTC's Line of Business Program: A Benefit-Cost Analysis" (*Business Disclosure: Government's Need to Know;* ed. by Harvey J. Goldschmid, 1979), p. 92–94. *See also* F.M. Fisher and J.J. McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits", 73 *American Economic Review* 82–91 (March 1983).

[22] *Antitrust Law* at 136.

[23] H. Demsetz, "Two Systems of Belief About Monopoly" (*Industrial Concentration: The New Learning;* ed. by H. Goldschmid, J.M. Mann, and J.F. Weston, 1974), p. 177–79.

[24] *Antitrust Law* at 136.

amount of each, especially when the time horizon is broadened at either end. (*See* Parts II(B) and (D)(2), and III(A), above.)

d. *Rising Prices Accompanied by "Sluggish" Demand and "Excess" Capacity*

As indicated, examining price rises without reference to the effect of government controls can lead to erroneous inferences as to their cause. In this case, the rising prices cited by the majority followed over two years of price controls, and occurred during a period of extreme uncertainty and risk and of frequent raw material shortages. (*See* Part II(D)(2), above.)

Government controls also had a major effect on respondents' decisions on output and capacity. (*See* Part II(D)(2), above.) These included not only product regulations that, starting in 1974, threatened imminent drastic sales declines, but also EPA plant emissions controls that even made it necessary to invest in maintaining some existing equipment and plant. (IDF 38.) Thus, it is not surprising that two respondents, Ethyl and PPG, reduced plant capacity during the relevant period.

Yet, by 1979, a year plagued by supply problems with lead and sodium inputs (IDF 40.), Ethyl was operating at 95 percent capacity, and in 1980—for which no capacity data are available—it replaced DuPont as the industry leader. (IDF 38; ID, Appendix C.) DuPont, which operated at between 84 and 94 percent of capacity in the recession years of 1974 and 1975, achieved 100 percent capacity in 1976. (IDF 39.) While the record is somewhat unclear following that time, the ALJ states that DuPont operated at [30] "excess capacity" through 1979. (IDF 39.)

Nalco operated at from 77 to 89 percent capacity during the 1974 to 1979 period and had supply problems in three of those years. (IDF 41.) The ALJ found that "PPG did not have any significant excess capacity" from 1974–1976, and operated at 86, 100, and 88 percent capacity during the next three years. (IDF 40.) In addition, Nalco was the high-cost producer in the industry, so that any excess capacity on its part is perfectly consistent with price equal to marginal cost for it, the marginal firm—the competitive optimum for an industry with varying firm costs. (*See* Part IV(A)(2)(b), above.)

Similarly, PPG's current exit and creation of excess facilities that no one wants to buy is itself inconsistent with any idea that profits in this industry *were* during the "relevant period" or are today excessive. This is an important point because economic profit—the kind that is relevant to any assessment of competition—is a forward-looking concept that must take expected future events (such as eventual

near-extermination) and uncertainty (such as the timing of the process) into account. (*See* references cited at Part IV(A)(2)(b), above.)

e. *"Additional Factors"*

The most important "additional factors" in this case are the various beneficial services and innovations in products and production processes. (*See* Part II(A), above.) Once again, as in the case of the structural factors, these are ignored by the majority opinion.

f. *Summary*

The decision's (mis)application of performance criteria to the record evidence does not provide support for an oligopoly theory under which anticompetitive effects can be inferred from the challenged practices. The majority's facile treatment of these criteria only adds to the confusion caused by the conduct criteria, which fail to explain when the challenged practices become a violation, in what combination, or when adopted by what number of firms. **[31]**

B. *Evidence on Conduct*

What seems to trouble the majority most in this case is its perception that there is some sort of intent on the part of each of the four respondents to "maintain" a "stable market" in this industry by unilaterally maintaining the challenged practices. In support of this perception, the majority cites an Ethyl document expressing concern about "maintaining a stable market for antiknocks" in a period of "market shrinkage" and "overcapacity." (Maj.Op. at 52.) It also cites testimony by DuPont's Director of Marketing that selling at F.O.B. to a large customer in this time period could lead to a decline in general prices (*Id.* at. 81.), and statements by him and an Ethyl document about the possible impact of eliminating MFN clauses on industry "marketing practices." (*Id.* at 72–73.) Finally, the majority cites evidence that both DuPont and Ethyl view the practice of advance price notification with grace periods as a way to "test" competitors' reactions before making pricing actions final. (*Id.* at 58–60.)

While the cited statements are subject to varying interpretations, they may reflect little more than expressions of great concern about the inevitable destabilization and monetary losses that would occur once the environmental controls were put into place and phased into completion. Recall that the phasing down was to have begun on January 1, 1974—the beginning of the "relevant period," but after a series of uncertain delays (*ex ante*), the start of the process began on January 1, 1978. (IDF 44.) It was followed by a precipitous drop in demand, over 50 percent in three years (IDF, Appendix C.), as the controls became binding.

Thus, the Ethyl statement about "maintaining" a "stable market," as well as the DuPont and Ethyl statements about the potential for destabilization from changing certain marketing practices, are consistent with fully justified fears about what might happen to them as a result of sudden changes in industry conditions—whether they be caused externally such as by government controls, or internally, such as those initiated unilaterally in the form of new or different marketing practices, products, or production [32] methods.

Moreover, concern expressed (internally) by some business executives from two respondents about the prospect of market destabilization does not necessarily imply that price or the price-service equilibrium was at supracompetitive levels. Any resulting destabilization could drive existing prices below cost or below the competitive level—the marginal cost of the marginal firm—even from a pre-existing competitive equilibrium, as PPG's recent exit makes clear. In that regard, the cited statements do not establish an intent to increase market stability. It is one thing to adopt actions that might raise prices above competitive levels. It is quite another simply to refrain from actions that might reduce prices below competitive levels.

Another aspect of the challenged practices on which the majority place great reliance in finding liability is the use by some respondents of a grace period that provides notice of price changes over and above that contractually required. Although the majority notes that only DuPont and Ethyl used it (Maj.Op. at 95–96, 98–99.), its opinion attacks the grace period by including all four firms:

> By following a consistent practice over the relevant period adhered to by every industry member, the respondents have developed an effective way of signalling pricing intentions. The practice of conveying to a competitor what is, in effect, a price "offer," then waiting for a response—while avoiding different list prices at any time—actually goes beyond the competitive effect in exchanging current price information condemned in *Container Corp.* In that case, the practices which reduced competition consisted of agreements to exchange current price information by firms representing almost all the market. Here firms representing *all* the market have not only developed a system for exchanging current price information but for communicating future information with the opportunity to announce future prices on a contingent basis. (Maj.Op. at 51–52, emphasis in original.)

In fact, the price movements associated with the "grace period" are no more a "signalling tool" in this industry than the actual movement of prices among competitors in any small numbers situation. Where there are few competitors *any* price change is a "signal" to competitors about a firm's intentions, whether that change be in spot or futures market contracts. [33]

Moreover, as long as what amounts to a "futures" market in this case (the practice of advance price notification) is allowed to exist, no

change in the so-called "testing" behavior can be expected to occur. The very same "testing"—raising, then adjusting prices before they are implemented—can be achieved simply by adjusting the effective dates of the announced price increases after the announcement. In addition, the practice of forward-ordering at the old price can be extended in time to accommodate any disenchanted buyer, without any loss of sales, even after a price rise occurs. Thus, the majority's notion that respondents will be less likely to initiate price rises if the "grace period" is abolished is without support in the record.

C. *The Challenged Practices Were Adopted For Legitimate, Procompetitive Business Reasons, And Were Desired by Respondents' Customers*

The majority asserts that in assessing the challenged practices under a rule of reason approach, it considers any procompetitive effects of the practices. (Maj. Op. at 22.) It then proceeds to reject all of respondents proffered justifications for the practices, feeling they are outweighed by the assertedly anticompetitive effect of the practices on (list) price. (Maj.Op. at 89–91.) I find respondents' arguments persuasive and more than ample to offset the tenuous inferences upon which the majority's finding of anticompetitive effects is grounded.

Ethyl adopted one of the challenged practices—uniform delivered pricing—just prior to 1938 as a means of encouraging its buyers to receive the highly explosive fluids in tankcars as opposed to drums. (IDF 124.) Today, although some large refiners with plants located close to respondents' plants object to the practice, other buyers find that the practice saves state transportation and inventory taxes, which they would have to pay if title passed prior to delivery. They also testified that it simplifies purchasing decisions by allowing quicker evaluation and comparison of respondents' prices. (IDF 126.) The ALJ found that the practice "possibly does eliminate some costs customers would incur under an F.O.B. system" (IDF 126.), and that it is based on "some legitimate business reasons." (IDF 156.) The record indicates that freight savings to buyers located [34] closest to respondents' plants from an F.O.B. system would only be roughly one percent of selling price. (*See* Part IV(D), below.)

Like uniform delivered pricing, the ALJ found that MFN clauses are also based on "some legitimate business reasons." (ID 156.) The record reflects that refiners desire the clauses (ID 154.), including the small refiners. (IDF 121.) Moreover, one respondent—Nalco—met customer objections when it generally dropped the practice. (IDF 120.) (PPG was not charged with utilizing the practice.)

The ALJ found that refiner witnesses (including those from small refiners) also generally favored respondents' practice of providing

advance price notification. (IDF 112.) There is no evidence that it—or the accompanying grace period to which the majority particularly objects—was adopted as a result of any meeting of the minds of respondents. The grace period was not even utilized by Nalco. (Maj.Op. at 98.) PPG's officials testified that it would like to drop the practice. (IDF 110.) Refinery witnesses (including complaint counsel's) testified that they believed the practice saves them money by permitting "forward ordering" at the old price, and that it facilitates their firms' ability to reconsider respondents' contracts and to engage in financial and other planning. (IDF 112.)

D. *The Majority's Key Practice—Uniform Delivered Pricing—Was Presumed But Not Proven To Be Anticompetitive*

Finally, I discuss what appears to be the lynchpin of the majority's finding of liability—the impact of uniform delivered pricing, a practice respondents' customers utilized to compare prices. Given the majority's extensive treatment of the case law involving uniform delivered pricing, its statement that absent such delivered pricing the practice of advance price notification with grace periods might be lawful, and the fact that liability for two of the four respondents rests solely upon the asserted anticompetitive effects from this one practice, it seems appropriate to analyze the benefits and costs of this practice in some detail. **[35]**

Curiously, after mentioning respondents' arguments that the practice did not have a substantial influence on antiknock selling prices, the majority's decision makes no attempt to look at the numbers in the record. Instead it chooses to emphasize—erroneously—that as in *Triangle Conduit,*[25] respondents' plants are "scattered over the United States," so that delivery costs are quite different among them to different refiners. (Maj. Op. at 85, 93.) The majority then invokes its uncertainty theory, and finds that replacing this practice with F.O.B. pricing "would have introduced the complexity of 'masking' discounts because it would have introduced price variations among customers." (*Id.* at 82.)

This claim is supported in the first instance by reference to Nalco's practice of selling its Texas-produced TML to a customer in Antioch, California for the same price as DuPont charges in that location. (*Id.* at 76.) But the record shows that Nalco shipped its TML to Antioch, where it purchased DuPont's TEL for mixing prior to customer purchase. (IDF 89.) Similarly, DuPont would at least sometimes purchase TML from Nalco's Texas plant for mixing prior to delivery (IDF 20.) or, alternatively, ship its TML and TEL products to its mixing plant

[25] *Triangle Conduit & Cable v. FTC,* 168 F.2d 175 (7th Cir. 1948), *aff'd by equally divided court sub nom., Clayton Mark & Co. v. FTC,* 336 U.S. 956 (1949).

in Texas. Although DuPont had manufacturing plants in California and New Jersey, it has a mixing plant in Texas. Contrary to the majority's erroneous and misleading assertion that respondents' plants are "scattered across the country" (Maj.Op. at 85, 93.), they are in fact remarkably concentrated. DuPont's mixing plant as well as *all* plants of each of the other three respondents are all located within a 300-mile radius in Texas and Louisiana. (IDFs 1–4; Rand McNally Atlas.)

Thus, for example, when Nalco sold a 50/50 TML/TEL mix to customers in Antioch, California (TML cannot be used without mixing), its price with delivery cost would be identical to its F.O.B. price in either California or Texas or at any point in between. Moreover, the same kind of tendancy toward inter-area price equalization—**[36]**with or without this challenged practice—occurs when (as is generally true here) the *buyers'* plants are scattered across much of the U.S.

In addition, the ALJ found that average freight costs in the antiknock industry "are small in relation to the total market price." (IDF 190.) The exhibit cited by the ALJ on delivery costs (IDF 127; and RDX 333.) supports this finding. It shows that in 1979, average actual delivered costs among respondents' customers amounted to 1.53¢ per pound [less than 2 percent of list price in that year (IDF, Appendix D)] and that the lowest potential F.O.B. price for the refiner located closest to respondents' plants was 0.3¢ per pound. Thus, the maximum possible effect on such refiners versus the industry average was on the order of 1.2¢ per pound, or little more than 1 percent of selling price.

At the other end, there were two small refiners with shipping costs of 8.1¢ per pound who were, in effect, receiving a discount of that amount—less the 1.5¢ average actual freight costs per pound incurred in delivery. But 59.5 percent of the refiners, and 84.5 percent of shipments, had actual average freight costs of under 2¢ per pound. And 76 percent of the refiners and 94.5 percent of shipments had actual average freight costs of less than 3¢ per pound. Of the ten largest buyers, the spread ranged from 0.5¢ per pound to 2.8¢ per pound. (RDX 333.) Given the list-price of antiknocks—which DuPont currently places at $1.07 per pound (Maj.Op. at 106.)—it can readily be seen that the ALJ was correct in finding that delivery charges are "small in relation to sales price." (IDF 127.) This fact, coupled with the relatively centralized locations of respondents' plants, demonstrates that use of uniform delivered pricing cannot have had the significant anticompetitive effect attributed to it by the majority.

Given the legitimate business reasons for this practice (including the desire by respondents and their customers that respondents maintain title and liability for the explosive compounds until delivery),

given the savings on state taxes and on bookkeeping costs associated with determining where the products went, and given the small fraction of total sales price accounted for by transportation costs, I find insufficient support in [37] the record for the allegation that uniform delivered pricing had any substantial impact on competition in this industry. Elimination of uniform delivered pricing would not introduce substantial F.O.B. price variations among respondents, and its overall cost to customers as a group would likely exceed any conceivable benefits to particular refiners.

V. CONCLUSION

In sum, taken together the challenged practices—uniform delivered prices, advance price notification with grace periods, and most-favored-nation clauses—arguably reduce buyers' search costs and facilitate their ability to find the best price/value among refiners. In light of the intense competition in services and other non-list-price dimensions, moreover, the record fails to prove that these practices are anticompetitive. Their prohibition could well impose costs on consumers without any corresponding benefits. For these reasons, and for a similar lack of any evidence of anticompetitive structure and performance; for the failure to articulate an understandable and predictable standard of liability; and for the use of a criterion whose focus is so narrow as to present a possibly erroneous and harmful view of competition, I dissent.

Final Order

This matter, having been heard by the Commission upon the appeal of respondents and complaint counsel from the Initial Decision and upon briefs and oral argument, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondents and complaint counsel,

It is ordered, That the Initial Decision of the administrative law judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the [2] accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. Pending motions are dismissed or otherwise resolved as provided in the Opinion.

It is further ordered, That the following Order to Cease and Desist is hereby entered.

ORDER

I

Definitions

For the purpose of this Order, the following definitions shall apply:

A. *Lead-based antiknock compound* means additives to gasoline which increase its octane rating and which contain tetraethyl or tetramethyl lead.

B. *Delivered price* means a single undivided price inclusive of product and transportation charges.

C. *Point of origin price* means a price set by a respondent for a purchase by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The point of origin price shall be no greater than the delivered price offered to the customer less the actual transportation costs which would have been incurred by the seller if the sale were made on a delivered basis.

D. *Customer* means any actual or potential purchaser of a lead-based antiknock compound.

E. *Most favored nation agreement* means any contractual provision or understanding that requires, or potentially requires, a price paid by one purchaser of lead-based antiknock compound be offered to one or more other purchasers of the seller.

F. *Respondents* shall mean Ethyl Corporation and E.I. DuPont de Nemours and Company, their [3] successors and assigns, and their officers, agents, representatives and employees, acting directly or indirectly, through any corporation, subsidiary, division or other device, individually or in combination.

II

It is ordered, That respondents, in connection with the sale or distribution of lead-based antiknock compound in the United States, shall forthwith cease and desist from:

A. Publishing, distributing or communicating in any manner notice to any person outside the company, other than persons under contract in connection with marketing or sales, concerning any change or modification in the list price of lead-based antiknock compound in advance of the period contractually required for advance notice to customers.

B. Entering into a contract for the sale or delivery of lead-based antiknock compound with any customer containing a most favored nation agreement; or maintaining or complying with a most favored

nation agreement in any contract for the sale or delivery of lead-based antiknock compound.

Provided, That nothing in subpart A above, shall be construed to prohibit any respondent from (1) conveying to an actual or potential customer the information necessary to respond in good faith to a request to bid on or engage in negotiations regarding the purchase of any lead-based antiknock compound; (2) contracting to sell any lead-based antiknock compound at a price determined pursuant to such bid or negotiation which is effective on a specified future date subject to neither contingency nor condition; or (3) conveying information in compliance with any order, or in connection with participation in any proceeding, of a court, legislative body or administrative agency. [4]

III

It is further ordered, That whenever a respondent offers a delivered price to a customer for the purchase of lead-based antiknock compound, said respondent shall offer the customer the option of a point of origin price at the respondent's production facility from which shipment is to be made, and at the option of any actual or potential customer:

A. Allow any customer to arrange or furnish transportation for any purchased lead-based antiknock compound from the respondent's production facilities; or

B. Offer a separately-stated price for transportation furnished or arranged by the respondent.

IV

It is further ordered, That each respondent, individually, shall forthwith make its lead-based antiknock compound sales contracts and other agreements consistent with this Order.

V

It is further ordered, That nothing contained in this Order shall be interpreted as prohibiting a respondent when acting individually, (1) from establishing the price at which, and selecting the customers to which, it shall sell; or (2) from selling at a point of origin or delivered price established in good faith to meet the equally low price of a competitor. No [5] pricing practice engaged in by a respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this Order.

VI

It is further ordered, That each respondent shall forthwith deliver a copy of this Order to all present and (for a period of ten years from the entry of this Order) future personnel, agents and representatives of respondents having sales, distribution or policy responsibilities regarding lead-based antiknock compound, and each respondent shall forward a copy of this Order to each of its purchasers during the past twelve months of any lead-based antiknock compound in the United States.

VII

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

VIII

It is further ordered, That each respondent shall, within sixty (60) days after service upon it of this Order, file with [6] the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order and such additional reports thereafter as the Commission may require.

Chairman Miller dissented. Commissioner Douglas did not participate.

IN THE MATTER OF

SUCCESS MOTIVATION INSTITUTE, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1768. Consent Order, July 14, 1970—Modifying Order, March 22, 1983

The Federal Trade Commission, having received no objections to a show cause order, has reopened this proceeding and modified its order issued on July 14, 1970 (77 F.T.C. 943), so as to provide prospective franchisees and distributors with more information on sales data, as well as success and failure rates, so that they may better evaluate their chances for success.

ORDER REOPENING THE PROCEEDING AND MODIFYING THE DECISION AND ORDER

On July 14, 1970, in this matter the Commission issued against respondents Success Motivation Institute, Inc. and Paul J. Meyer, in connection with the sale of franchises or distributorships, in commerce (as "commerce" is defined in the Federal Trade Commission Act), a Decision and Order to Cease and Desist.

On December 8, 1982, the Commission issued an order for respondents to show cause why the proceeding should not be reopened and the Decision and Order to Cease and Desist issued on July 14, 1970, should not be modified in a certain respect.

Respondents Success Motivation Institute, Inc. and Paul J. Meyer raised no objection to the proposed modification.

Therefore, the Commission being of the opinion that the proposed modification will increase the ability of prospective purchasers to evaluate their chances for success as distributors or franchisees of respondents and, therefore, that the public interest will be served by modifying the Decision and Order in this matter as requested,

It is ordered, That the proceeding be, and hereby is, reopened.

It is further ordered, That the Decision and Order issued on July 14, 1970, be, and hereby is, modified by deleting paragraph (3) of the order and by substituting for paragraph (4) of the order the following (with paragraphs to be renumbered appropriately):

(4) Failing to furnish to prospective franchisees or distributors a written tabulation or statistical summary showing, on an accumlative and comparative basis, for each fiscal year, for each of the corporate respondent's operating divisions the following information as it per-

tains to the division of which the prospective franchisee or distributor is considering acquisition of a franchise or distributorship:

(a) The median and mean gross sales to respondents' franchisees or distributors exclusive of initial inventories sold to new franchisees or distributors during the fiscal year.

(b) The number of franchisees or distributors at the beginning of the fiscal year, the number appointed during the year, the number terminated during the year, the number retained at the end of the year, and the length of time that those retained at the end of the year have been respondents' franchisees or distributors.

(c) The foregoing information shall be tabulated as a running 4-year analysis so that prospective franchisees or distributors will be furnished such information for the 4 fiscal years immediately preceeding the year in which the information is to be furnished, *provided* that, the information for the fiscal year most recently completed prior to the year in which the information is to be furnished will be made available within 45 days of the close of the fiscal year.

(d) The tabulation will include all franchisees or distributors, whether full or part time, whether or not purchases were made during the fiscal year(s) on which the tabulation is based.

(e) The information required to be furnished under this paragraph will be given to prospective franchisees or distributors at the first face-to-face meeting or 10 days before the execution of any franchise or distributor agreement, whichever comes first, on a separate document which the prospective franchisee or distributor may keep.

IN THE MATTER OF

DAMON CORPORATION

Docket C–2916. Show Cause Order, March 29, 1983

ORDER TO SHOW CAUSE WHY ORDER REQUIRING COMMISSION APPROVAL FOR CERTAIN ACQUISITIONS SHOULD NOT BE MODIFIED

On June 2, 1982, respondent Damon Corporation ("Damon") filed a petition requesting that the Commission reopen the proceeding in Docket No. C–2916 and eliminate that portion of the Order requiring Damon to obtain prior Commission approval for acquisitions of independent laboratories in twelve geographic markets and to notify the Commission of any other acquisitions of independent laboratories. The petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days, Damon voluntarily waived that deadline in this case. On January 31, 1983, the Commission denied Damon's petition, concluding that the petition failed to demonstrate that either changed conditions or the public interest required elimination of the prior approval requirement. However, the Commission believes that it may be in the public interest to exempt small laboratories from the requirement, and is therefore issuing this order to show cause why a partial modification should not be ordered.

A. *Complete Elimination Of The Prior Approval Requirement Is Not Warranted*

As described in more detail in the letter denying Damon's petition, the Commission found that Damon had not demonstrated any harm to competition such that the public interest would require complete elimination of the prior approval requirement. In considering petitions to reopen under Rule 2.51, the Commission balances the reasons for modifying an order against the reasons for its retention. Damon's principal argument was that the order, as a practical matter, prevented acquisitions that were necessary to permit Damon to compete effectively. However, Damon's petition did not provide any evidence that its allegations in this regard extended beyond smaller acquisitions only.

Damon also alleged that the order served no valid purpose because no acquisition of medical laboratories could possibly injure competition. Were this true, then even limited evidence of injury to Damon

might justify eliminating the prior approval requirement. However, Damon's petition did not adequately address possible differences between large, automated laboratories (and the mix of tests they perform) and other types of laboratory facilities. Thus, not only did Damon fail to prove that acquisitions of large laboratories were necessary to its ability to compete or were in any way hampered by the prior approval requirement, it also failed to prove that acquisitions of large laboratories would no longer raise any antitrust concern. Damon's showing on both sides of the balancing test was limited primarily to small acquisitions.

The Commission also found that Damon's petition had not demonstrated changed conditions of fact that would require elimination of the prior approval requirement. Much of the petition attempted to show that the complaint had misstated Damon's market shares, and that it was based on an erroneous market definition. However, Damon had the opportunity to contest the allegations of the complaint but chose not to do so, and is not now entitled to an order modification on this theory alone. In any event, for the reasons just discussed, the market conditions that were alleged in the petition would not support a total elimination of the prior approval requirement for all acquisitions, large and small. Finally, the Commission found that its failure to challenge acquisitions of other medical laboratories or its recent statement on horizontal mergers did not constitute a "change of law" sufficient to justify the requested modification.

B. *Grounds For Modification Of The Prior Approval Requirement*

However, the Commission does find that the public interest may require some modification of the order. The prior approval provision appears to impede acquisitions of small laboratories, an activity which seems to be an important competitive tool for large laboratory companies. At the same time, acquisitions of small pathologist-owned laboratory businesses appear to present little probability of harm to competition since these laboratories are numerous and entry at this small scale of manual operation is frequent.

First, because of the character of acquisitions in the medical laboratory industry, the prior approval provision may place Damon at a critical disadvantage in persuading individual owners of small target laboratories to sell their businesses to Damon. Thus, despite the technical availability of the prior approval procedure, the order may effectively bar some acquisitions. Damon has shown that the publicity, delay, uncertainty, and expense of seeking prior approval can often impede its efforts to reach an agreement. This is because the industry is characterized by frequent and quickly consummated sales to larger laboratory companies of small pathologist-owned laboratory busi-

nesses, the primary value of which lies in the good will existing between the pathologist owners and their physician clients. By interfering with the practical transferability of this good will, the prior approval procedure may destroy the value of an acquisition.

Second, Damon has demonstrated that acquisitions are a particularly important competitive tool in the laboratory industry. Thus, to the extent the order prevents acquisitions, it may hinder effective competition by Damon. Damon has shown that sales volume is subject to continual erosion in the laboratory business due in part to the formation of new pathologist-owned laboratories whose owners have professional relationships with the physician clients of larger firms, and in part to decisions by physicians and hospitals to do some testing "in-house." At the same time, such professional relationships make it difficult to rely on ordinary sales efforts to win new customers. Damon has presented facts demonstrating that other large national competitors rely heavily on numerous acquisitions of small pathologist-owned laboratories, often hiring the former owners as sales representatives, and that Damon has not been able to compete as effectively in this manner.

Therefore the public interest appears to require the exemption of small laboratories from the order's acquisition approval provision. An exemption for laboratories with less than approximately $1 million in annual revenues seems appropriate for consideration for several reasons.[1] No laboratory acquired by Damon since the order was issued (in markets not covered by the order) exceeded $1 million in total annual revenues. Moreover, the Commission understands that over 90% of the laboratories in the country do fewer than 250,000 tests per year. The average price for all types of medical laboratory tests is somewhere between $2 and $3 per test, depending in part on the size of the laboratory and the sophistication of its equipment. Assuming that most of these smaller firms perform tests to a great extent manually and therefore applying the greater average price figure, it is reasonable to conclude that over 90% of the laboratories do less than $.75 million in business annually. Thus, a $1 million exemption would allow Damon to acquire, without prior approval, well over 90% of the laboratories in any given area.[2] This should substantially eliminate any harm to competition possibly resulting from the order.

Balancing the need for this modification against the reasons not to make it, the Commission believes that acquisitions of laboratories

[1] The proposed order modification specifies a limit of $250,000 per quarter in each of the four quarters preceeding the acquisition. This will assure that the acquired laboratory was not undergoing recent substantial expansion.

[2] Damon's petition is in accord with these figures. Of 286 non-hospital laboratories in the Chicago market, the petition estimates only 16 generated over $1 million in revenues in 1981. The corresponding figures for Philadelphia are 110 of which 11 exceeded $1 million. Petition at 10. Indeed, it appears that as many as half the non-hospital laboratories test fewer than 50,000 specimens annually. Affidavit of Thomas Hansen (attached to petition) at Tables 5 and 6.

with less than $1 million in annual revenues would be very unlikely to raise significant antitrust concerns for several reasons. First, there exist numerous small laboratories in every major metropolitan area throughout the country. Second, smaller laboratories are less frequent providers of highly sophisticated or "esoteric" test services. Third, there appears to be actual frequent entry of laboratories on a small scale by pathologists.

In sum, the Commission believes that it may be in the public interest to exempt laboratories with less than $1 million in annual revenues from the acquisition approval provision in order to relieve any impediment to effective competition that may result from the order. Moreover, because acquisitions of such laboratories are so unlikely to raise antitrust concerns, there appears to be little reason not to order such relief.

Finally, it should be noted that any modification of the consent order by the Commission would operate only prospectively. The substantial interest in preserving the enforceability of Commission orders dictates that Damon remain liable for civil penalties or other equitable relief if any previous violation of the original order should be discovered. This is so regardless of whether the violation involves an acquisition that would have subsequently qualified for the exemption proposed by this order to show cause, if the exemption had not been granted at the time the acquisition was made.

For the foregoing reasons, the Commission hereby issues this order to show cause why the order should not be modified by adding, to Part II thereof, the following paragraph E:

E. Acquisitions consummated after [the date at which this modification becomes effective], of any Independent Laboratory which, during each of its four most recent fiscal quarters preceding the acquisition, has had less than two hundred and fifty thousand dollars ($250,000) in Net Sales of Medical Laboratory Tests and Test Services performed on all specimens (from wherever originating) are exempt from the provisions of Paragraphs A through C of this Part II.

In accordance with Commission Rule 3.72, Respondent has 30 days from the date of service of this Show Cause Order to file an answer hereto. The Commission further directs that the Bureau of Competition shall file its reply to any answer filed by Respondent within 30 days from the date such answer is filed.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

I dissent from the Commission's decision to issue this Order to Show

Cause. The petition to modify Damon's 1978 order should simply be denied.

At issue here is the order's "prior approval" provision, requiring Damon to get Commission approval of any future acquisitions in twelve narrow geographic markets for a period of ten years.

Prior approval provisions, of course, have been a common fencing-in feature in decades of Commission orders. By requiring firms who have engaged in illegal mergers to get Commission approval before making future acquisitions, a prior approval provision serves both as a prophylactic measure designed to prevent future law violations by the same firm and as a deterrent to other firms which might violate the antitrust laws. As such, a prior approval provision is a modest and sensible restraint on firms that have demonstrated a propensity to violate the law.

Nevertheless, Damon contends that the prior approval provision prevents it from aggressively competing with its competitors. Apparently, by "aggressive competition," Damon means buying up smaller independent laboratories. Damon does not argue that competition would be harmed because of the possibility that the Commission would deny approval of procompetitive mergers. Instead, it argues that the publicity and delay involved in the prior approval process scares off potential acquisition candidates and makes Damon a less attractive suitor than its competitors. On this slender reed, it wants the prior approval requirement dropped entirely.

In justifying an order modification, a petitioner has the burden to demonstrate that "changed conditions of law or fact," or the "public interest," "requires;; such a modification. I agree with the other Commissioners that Damon has not shown any changed conditions of law or fact to justify lifting the prior approval provision. But I disagree that the more nebulous alternative "public interest" standard, which is rapidly becoming the main standard for relief cited by the Commission in our recent spate of order modifications, provides any other ground for the requested relief.

While the Commission is not willing (correctly, in my view) to lift the prior approval provision altogether, it is willing to waive the requirement for acquisitions of independent medical laboratories with under $1 million in sales. It's estimated that this change would exempt over 90% of the laboratories in the covered markets from the prior approval requirement.

The Commission's rationale for this partial exemption rests on the assumption that the public interest is better served by permitting Damon to gobble up smaller companies faster and more cheaply than it can under the existing order. In turn, that assumption can only be justified by a finding that the modest burdens of brief delay and the

risk of some publicity, which are inherent in *any* prior approval clause, so frustrate Damon's ability to compete that, on balance, the existing order is anticompetitive. I fail to see how one could draw this conclusion, particularly given the very weak evidence of injury presented by Damon. In my view, Damon has failed to show how this relief is required by the public interest, and accordingly I would deny the petition in its entirety.

SEPARATE STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

By issuing this order to show cause, the Commission wisely corrects an order whose provisions may well be anticompetitive. Trends in entry and expansion in the market for medical testing services since the Commission entered its order in 1978 indicate that the contemplated modification is far more likely than not to stimulate competition and benefit consumers. The proposed adjustment will afford Damon more freedom to pursue acquisitions which, the historical record strongly suggests, promise to yield valuable cost- and price-reducing scale economies without a corresponding growth in market power.

For the longer term, our experience in this matter suggests the pitfalls of intervening too swiftly to prevent acquisitions in industries marked by rapid innovation and growth. The Commission entered its original order as Damon had just begun to reap the fruits of a pioneering effort to consolidate small, higher-cost testing facilities into more efficient central operations. The Commission's initial concern with Damon's early, seemingly large market shares in Philadelphia and Chicago now seems seriously misplaced in light of the speed with which large-scale, subsequent entry by several major firms dramatically reshuffled market shares and changed Damon's relative standing in the industry. In short, sudden, dynamic change soon rendered the Commission's intervention virtually irrelevant and possibly counterproductive.

For these reasons, it is hard to take seriously Commissioner Pertschuk's suggestion that the proposed modification serves only to enable Damon "to gobble up smaller companies faster and more cheaply than it can under the existing order." If anything, this case reveals how an indiscriminately "aggressive" enforcement posture can deprive consumers of the superior performance that the antitrust laws are designed to promote. There is little to say for a merger policy that fails completely to account for the procompetitive role acquisitions can play in achieving efficiencies and encouraging desirable entrepreneurial enterprise. The troubling question is not whether the Com-

mission should modify this order, but rather why it accepted it in the first place.

IN THE MATTER OF

ETHYL CORPORATION, ET AL.

Docket 9128. Interlocutory Order, April 1, 1983

ORDER EXTENDING IN CAMERA TREATMENT

On March 16, 1983 the Commission provided notice to respondents that it intended to issue an opinion in this matter containing certain information contained in the *in camera* record. Respondents have filed various objections to the release of some of this information. In addition to information contained in the opinion, the record, including the initial decision by the administrative law judge, contains information which has been kept *in camera.*

Upon consideration of the objections filed by respondents to release of this information and the public interest in having access to a public record, *it is hereby ordered* that the opinion in this matter will be released with certain portions excised. To the extent that previously *in camera* information is released in the opinion as to which release one or more respondents have objected, the Commission has determined that release will not result in a "clearly defined serious injury." *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1188 (1961); *Bristol-Myers Co.,* 90 F.T.C. 455, 456–457 (1977). As to information excised from the opinion and the remaining *in camera* information, the Commission plans to release some or all of this information no earlier than 30 days from the date of this order subject to any additional particularized showing by respondents of the need for confidentiality, such showing to be made within 30 days.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, April 8, 1983

ORDER STAYING MODIFIED ORDER TO CEASE AND DESIST

It is hereby ordered, That the "Modified Order to Cease and Desist" issued in this matter this day, be stayed as to respondent American Home Products Corporation until the later of (1) September 30, 1983 or (2) 90 days following the disposition of a petition to reopen, if such petition is filed by American Home Products Corporation no later than April 15, 1983.

Commissioner Pertschuk dissented.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Final Order, Sept. 9, 1981—Modifying Order, April 8, 1983

The Federal Trade Commission has modified its Final Order In the Matter of American Home Products Corporation, et al., issued on Sept. 9, 1981 (98 F.T.C. 136), in accordance with a decision rendered by the Court of Appeals for the Third Circuit on Dec. 3, 1982. The modification deletes the provision that had prohibited the maker of Anacin and Arthritis Pain Formula from making any non-comparative effectiveness or side effects claims for any over-the-counter drug product unless the company possessed a reasonable basis when making such claims.

MODIFIED ORDER TO CEASE AND DESIST

Respondent American Home Products Corporation having filed in the United States Court of Appeals for the Third Circuit a petition for review of the Commission's order issued herein on September 9, 1981; and the Court having on December 3, 1982, rendered its decision modifying the Commission's order and, as so modified, affirming the order; and the time for filing a petition for certiorari having expired and no petition having been filed:

Now, therefore, it is hereby ordered, That, pursuant to 15 U.S.C. 45(i), the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read:

ORDER

I

It is ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that a claim concerning the superior effectiveness or superior freedom from

side effects of such product has been established or proven unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or freedom from side effects that it is represented to have, and (2) that such comparative effectiveness or freedom from side effects is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. The investigations shall be conducted in accordance with the procedures set forth below:

At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. The clinical investigations shall be conducted as follows:

1. The subjects must be selected by a method that:

a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any);

b. Assigns the subjects to the test groups in such a way as to minimize bias; and

c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.

2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.

3. The plan or protocol for the investigations and the report of the results shall include the following:

a. A clear statement of the objective of the investigation;

b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer;

c. A comparison of the results of treatments or diagnosis with a

control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data.

d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

B. Making any representation, directly or by implication, of superior effectiveness or freedom from side effects of such product unless:

1. The superior effectiveness or superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the comparative efficacy or side effects claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

II

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription drug product, in or affecting commerce, as "commerce" and "drug" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when such ingredient is commonly used in other non-prescription drug products intended for the same use or uses as the product advertised by respondent.

B. Making any false representation that such product has more of an active ingredient than any class of competing products.

C. Misrepresenting in any manner any test, study or survey or any

of the results thereof, concerning the comparative effectiveness or freedom from side effects of such product.

III

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any products in which "Anacin" or "Arthritis Pain Formula" is used in the name, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and conspicuously that the analgesic ingredient in such product is aspirin, when such is the case and when the advertisement makes any performance claim for the product.

IV

It is further ordered, That respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that Anacin relieves nervousness, tension, anxiety or depression or will enable persons to cope with the ordinary stresses of everyday life.

V

It is further ordered, That respondent the C.T. Clyne Company, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of "Arthritis Pain Formula" or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when respondent

knows or has reason to know that such ingredient is commonly used in other nonprescription internal analgesic products intended for the same use or uses as the product advertised by respondent.

B. Making any representation, directly or by implication, of superior freedom from side effects of such product, unless:

1. Respondent knows or has reason to believe that the superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

VI

It is further ordered, That respondents American Home Products Corporation and the C.T. Clyne Company, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in their respective corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in their respective corporation which may affect compliance obligations under this Order.

It is further ordered, That the respondents herein shall within sixty (60) days after service of this Order upon them, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which they have complied or intend to comply with this Order.

IN THE MATTER OF

DAHLBERG ELECTRONICS, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8929. Final Order, Aug. 6, 1974—Modifying Order, April 11, 1983

The Federal Trade Commission has reopened this matter and modified its order issued on Aug. 6, 1974 (84 F.T.C. 222), to permit the company to suggest resale prices to its dealers. The modified order leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING DECISION AND ORDER

On November 24, 1982, respondent Dahlberg, Inc., formerly known as Dahlberg Electronics, Inc, filed a Request to Reopen Proceeding and to Set Aside Consent Order. The request was filed pursuant to Section 2.51 of the Commission's Rules of Practice. It was placed on the public record for comments. No comments were received.

Respondent asks the Commission to reopen this proceeding and to set aside the order to cease and desist entered on August 6, 1974. The order generally prohibits respondent in the sale of its own brand name hearing aids from, among other things, employing exclusive dealerships and dealer territorial and customer restrictions and from engaging in resale price maintenance and requires respondent to deal with all persons competing with its dealers.

Respondent relies on changed conditions of fact and law and the public interest in seeking to have the proceeding reopened and the order set aside. It relies principally on the Commission's recent opinion and decision in *Beltone Electronics Corp.,* Docket No. 8928 (July 6, 1982) [100 F.T.C. 68]. In that matter, the Commission dismissed a complaint against another manufacturer of hearing aids that the Commission had issued on May 8, 1973, simultaneously with the complaint issued in this matter.

The Commission has considered respondent's request and other relevant information and determined that respondent has demonstrated that it would be in the public interest to reopen the proceeding to set aside Subparagraph Nos. 1, 2, 3, 4, 6, 7, 8, and 9 of Paragraph I of the order. However, the Commission will not be precluded from taking enforcement action concerning such practices when the Commission has reason to believe that they violate the law.

The Commission has further considered whether to modify as requested by respondent Subparagraph No. 5 of Paragraph I, the prohi-

bition against resale price maintenance. In this regard, the Commission has determined it would be in the public interest to modify the paragraph to terminate the prohibition against suggested resale prices.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Subparagraph Nos. 1, 2, 3, 4, 6, 7, 8, and 9 of Paragraph I shall be set aside as of the effective date of this order.

It is further ordered, That Subparagraph No. 5 of Paragraph I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, April 11, 1983

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT FOR MOOTNESS AND LACK OF PUBLIC INTEREST

By motion dated January 17, 1983, as supplemented by an affidavit in support of the motion filed February 3, 1983, respondent has moved for an order dismissing the complaint for mootness and lack of public interest. Further, the respondent requests that the Commission reopen the record to consider the developments set out in the motion which, in its view, require the Commission to dismiss this complaint.

Respondent argues that five events have occurred since the close of the record in this proceeding which render further proceedings moot. Respondent notes the settlement of certain class actions by buyers of land at Rio Rancho Estates, the sale of all remaining unsold vacant land at Silver Spring Shores to General Development Corporation [100 F.T.C. 488], the transfer of "substantially all" of the land at El Dorado, the reconveyance of land at Oakmont Shores to the trustee in bankruptcy of the former owner, and the enactment of amendments to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701, *et seq,* and the regulations thereunder. As a result of all of these changed circumstances, respondent argues that it is no longer selling much of the land involved in the complaint, and that future sales will be governed by the stronger protections now present in the amended Interstate Land Sales Full Disclosure Act. Accordingly, respondent argues, any possible Commission order is unnecessary.

On January 31, 1983, complaint counsel filed an answer in opposition to the respondent's motion.

The Commission sees no reason to reopen the record to evaluate the impact of these developments on any potential order which it may adopt in this matter. The reconveyance of lots at Oakmont Shores to the Trustee in Bankruptcy occurred in 1975, and is reflected in the record. (*See, e.g.,* Initial Decision at pp. 73–74.) Similarly, information and arguments concerning the effect of class action settlements, and the amendments to the Interstate Land Sales Full Disclosure Act and the regulations thereunder, are reflected in the record and the briefs. (*See, e.g.,* Denial of Respondent's Motion for an Order Pursuant to 5 U.S.C. 557(d)(1), (12/12/78); Ruling on "Respondent's Motion to Take Official Notice and for a Hearing on Form and Content of Relief" (6/11/79); Respondent's Reply to Complaint Counsel's Answer to Re-

spondent's Appeal, pp. 20–22, 72; Respondent's Answer to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order, at p. 298.) In addition, the Commission is free to take judicial notice of the changes in the law in this area. Finally, the Commission is fully aware of the terms of the purchase agreement by which General Development Corporation bought the remaining unsold land at Silver Spring Shores from respondent, since it entered an order approving certain terms of that purchase on September 30, 1982 [100 F.T.C. 488]. As a result, the record adequately reflects the "developments" which respondent would have the Commission reopen the record to recognize.

Such developments do not, however, necessarily render further proceedings moot. The Order sought by complaint counsel and largely approved by the Administrative Law Judge applies prospectively to all future sales of undeveloped land, not just the four subdivisions involved in the instant matter. It is well-established that the Commission may enter an Order to prevent future wrong-doing by a respondent that has engaged, but is no longer engaged, in the deceptive or unfair acts or practices alleged in the complaint. *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied,* 429 U.S. 815 (1977). Further, complaint counsel have clearly stated their intention to recommend consumer redress for past deceptive acts or practices pursuant to Section 19 of the FTC Act. Whether the respondent has ceased such acts or practices is not relevant to such an action. At best the developments cited by the respondent affect the terms of the Commission's Order, not whether such an Order should issue at all. To that extent, the record adequately reflects those concerns and the Commission will, of course, consider the entire record in determining what, if any, relief may be appropriate in this case.

Accordingly, having considered respondent's motion,

It is hereby ordered, That Respondent's Motion to Dismiss the Complaint for Mootness and Lack of Public Interest be, and hereby is, *denied.*

IN THE MATTER OF

GULF & WESTERN INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9153. Complaint, March 25, 1981—Decision, April 14, 1983

This consent order requires a New York City corporation engaged in the burial casket industry, among other things, to timely divest to a Commission-approved buyer, Alabama-Indiana Metal Products, Inc., located in Anniston, Alabama. The order also requires the corporation to permit prospective purchasers to inspect the Anniston facility and supply them with information concerning the facility's operation. Further, the corporation is barred from acquiring any stock or interest in any concern engaged in the manufacture or sale of burial caskets or their components, without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr., Michael E. Antalics, Debra A. Simmons* and *Randall D. Marks.*

For the respondent: *Robert L. Jones,* in-house counsel, New York City and *Charles E. Koob, Simpson, Thacher & Bartlett,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has acquired the stock or assets, as hereinafter described, of corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

(1) For the purposes of this Complaint, the following definitions shall apply:

(a) A *burial casket* is a container used to display, transport and bury the deceased.

(b) A *burial casket metal knockdown* (*KD*) is an unassembled metal casket side, end, bottom, top or lid, and bridge, which, when assembled, is referred to as a burial casket shell.

II. GULF & WESTERN INDUSTRIES, INC.

(2) Respondent, Gulf & Western Industries, Inc. ("G&W"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1 Gulf & Western Plaza, New York, New York.

(3) G&W achieved entry into the burial casket industry in 1978 through its acquisition of Simmons Company and its subsidiary, Simmons Casket Company ("Simmons").

(4) Prior to its acquisition by G&W, Simmons Company was a Delaware corporation with its principal place of business located at Jones Bridge Road, Box 49000, Atlanta, Georgia.

(5) In 1979 G&W, ranking 52nd on Fortune magazine's list of the 500 largest industrial corporations, had sales in excess of $5.2 billion, assets in excess of $5.1 billion, and net income in excess of $227 million.

(6) In 1979 G&W was the second largest manufacturer of burial caskets in the United States, with sales of approximately $57 million, and was also a substantial manufacturer of KDs.

(7) At all times relevant herein, G&W sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

Count I

III. NATIONAL CASKET CO.

(8) Prior to its acquisition by G&W, National Casket Co. ("National Casket") was a wholly-owned subsidiary of Walco National Corporation ("Walco"). Walco is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 743 Fifth Avenue, New York, New York. The principal place of business of National Casket is located at 355 Commonwealth Avenue, Boston, Massachusetts.

(9) Prior to its acquisition by G&W, National Casket was engaged in the manufacture of KDs and in the manufacture and sale of burial

caskets. In 1979 National Casket was the third largest manufacturer of burial caskets with sales of approximately $25.5 million and was a substantial manufacturer of KDs.

(10) At all times relevant herein, National Casket sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

(11) On or about April 17, 1980, G&W acquired the burial casket business of Walco for approximately $12.5 million. Under the terms of the agreement, G&W purchased all of the principal assets of National Casket, including inventory, manufacturing equipment and accounts receivable. The sale also included the transfer of leasehold rights to National Casket's manufacturing facility located in Lancaster, Kentucky and its various warehouses and sales outlets.

V. TRADE AND COMMERCE

(12) For purposes of Count I of this Complaint, the relevant lines of commerce are the following:

(a) The manufacture and sale of burial caskets in the United States ("the burial casket market"); and

(b) The production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(13) In 1979 approximately 1.8 million burial caskets were sold to funeral directors in the United States. Total 1979 dollar sales of burial caskets to funeral directors were approximately $543 million.

(14) Prior to the National Casket acquisition, G&W and National Casket were substantial actual competitors in the burial casket market.

(15) In 1979 G&W was the second largest manufacturer and seller of burial caskets, with a market share of approximately 10%.

(16) In 1979 National Casket was the third largest manufacturer and seller of burial caskets, with a market share of approximately 5%.

(17) Concentration in the burial casket market is high.

(18) There is a trend toward increasing concentration in the burial casket market and the acquisition of National Casket by G&W has increased the level of concentration in the market.

(19) Barriers to entry into the burial casket market are substantial.

(20) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately $70 million.

(21) Within the KD production market, G&W and National Casket were substantial actual competitors prior to the acquisition, with approximately 22.4 and 5.6 percent of 1979 KD production, respectively.

(22) Within the KD production market, concentration is high.

(23) Within the KD production market, there is a trend toward increasing concentration and the acquisition of National Casket by G&W has increased the level of concentration.

(24) Barriers to entry into the KD production market are substantial.

VI. EFFECTS OF THE ACQUISITION

(25) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the burial casket market and in the KD production market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the burial casket market and in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the burial casket market and in the KD production market between G&W and National Casket has been or may be eliminated;

(c) G&W's position in the burial casket market and in the KD production market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the burial casket market and into the KD production market have been or may be significantly raised; and

(e) The levels of concentration in the burial casket market and in the KD production market have been or may be increased, and the trends toward increased concentration in these markets have been or may be accelerated.

VII. THE VIOLATION CHARGED

(26) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

Count II

VIII. WALLACE METAL PRODUCTS, INC.

(27) Prior to its acquisition by G&W, Wallace Metal Products, Inc. ("Wallace"), a corporation organized under the laws of the State of Indiana, was engaged in the manufacture and sale of KDs. Wallace's principal place of business is South Eighth & O Street, Box 70, Richmond, Indiana.

(28) Prior to its acquisition by G&W, Wallace was engaged in the manufacture and sale of KDs. In 1979 Wallace had KD sales of approximately $10.1 million.

(29) At all times relevant hereto, Wallace sold or shipped its products throughout the United States and was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IX. THE ACQUISITION

(30) On or about October 2, 1979 G&W acquired substantially all of the assets of Wallace, for approximately $4.0 million, including inventory, machinery and equipment, accounts receivable and real property located at its two KD manufacturing plants in Richmond, Indiana and Anniston, Alabama. G&W assumed certain of Wallace's liabilities amounting to approximately $5.0 million.

X. TRADE AND COMMERCE

(31) For the purposes of Count II of this Complaint, the relevant line of commerce is the production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(32) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately $70 million.

(33) Within the KD production market, G&W and Wallace were substantial actual competitors prior to the acquisition, accounting for approximately 9.3 and 13.1 percent of the 1979 KD production market, respectively.

(34) Within the KD production market, concentration is high.

(35) Within the KD production market, there is a trend toward increasing concentration and the acquisition of Wallace by G&W has increased the level of concentration.

(36) Barriers to entry into the KD production market are substantial.

XI. EFFECTS OF THE ACQUISITION

(37) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the KD production market and the finished burial casket market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the KD production market between G&W and Wallace has been or may be eliminated;

(c) G&W's position in the KD production market and in the burial casket market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the KD production market have been or may be significantly raised; and

(e) The level of concentration in the KD production market has been or may be increased, and the trend toward increased concentration in this market has been or may be accelerated.

XII. THE VIOLATION CHARGED

(38) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing or said agreement is for

settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Gulf & Western Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Gulf & Western Plaza, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That for the purposes of this Order the following definitions shall apply:

1. *G&W* or *Respondent* means Gulf & Western Industries, Inc., a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal offices at 1 Gulf & Western Plaza, New York, New York, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates[1] successors, assigns, and the officers, employees or agents of G&W's parents, divisions, subsidiaries, affiliates, successors, or assigns.

2. Gulf & Western Casket Corporation, a subsidiary of G&W, is engaged in the burial casket industry through various subsidiaries and divisions.

3. *Anniston* means the Anniston, Alabama facility of Alabama-

[1] For purposes of this Order, the term *affiliates* shall mean any entity over which Gulf & Western Industries, Inc. exercises control. The term *control* shall mean the direction or causing the direction of the management and policies of an entity, in any way.

Indiana Metal Products, Inc., a subsidiary of G&W. Anniston, at the time of divestiture, shall include the assets listed in Appendix A.

4. The term *burial casket* means a container used to display, transport and bury the deceased.

5. The term *KD* means an unassembled metal burial casket side, end, bottom, top or lid, and bridge which when assembled is referred to as a burial casket shell.

6. The term *burial casket shell* means a metal burial casket which has not been finished or trimmed with the requisite cloth interiors, decorative exterior hardware, and other finishings.

7. *Eligible person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved in advance by the Commission.

II.

It is further ordered, That G&W shall divest absolutely and unqualifiedly the Anniston facility to an eligible person within one hundred and eighty (180) days from the date of the issuance of this Order.

III.

It is further ordered, That divestiture under Paragraph II shall be in a manner which preserves the assets and business divested as a viable, ongoing, competitor in the KD market.

IV.

It is further ordered, That, pending the divestiture required by Paragraph II of this Order, G&W will continue to operate Anniston and shall not take any action, other than in the ordinary course of business, without the consent of the Federal Trade Commission, to inhibit the ability of Anniston to operate as a viable competitor in the KD market.

V.

It is further ordered, That G&W provide prospective purchasers with all information concerning the operations of Anniston requested by such purchasers and permit any inspections that may be required.

VI.

It is further ordered, That, for a period of ten (10) years from the date of issuance of this Order, G&W shall not, directly or indirectly, acquire any stock or share capital of, interest in, or assets used in the manufacture of burial caskets or KDs in the United States by any concern, corporate or non-corporate, engaged in the manufacture or sale of burial caskets or KDs in the United States without the prior approval of the Federal Trade Commission.

VII.

It is further ordered, That G&W shall, within sixty (60) days from the date of issuance of this Order, and every sixty (60) days thereafter until the divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which G&W intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

VIII.

It is further ordered, That for a period of ten (10) years from the date of issuance of this Order, G&W shall notify the Commission at least thirty (30) days prior to any change in G&W which affects compliance with the obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation.

APPENDIX A

This Appendix A is annexed to and made a part of this Order in Docket No. 9153. For purposes of this Order, Anniston shall mean: all assets, properties, titles for properties, interests, rights and privileges of whatever nature, tangible and intangible, located at the Anniston facility on the date of this Order, including, but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, dies and fixtures as described below, presses, as well as all G&W customer lists relating to the sale of KDs, copies of all G&W KD sales invoices describing KD sales processed through Anniston and every other G&W KD facility since January 1, 1982, trade names, trademarks, patents, patent applications, orders for purchase, and all other property owned or operated at the Anniston facility on said date, except that after the date of this Order, G&W may enter into transactions in the ordinary course of business.

On the date of the Order, the assets described above shall include, but shall not be limited to:

One Cincinnati 500-ton Press, serial number 38743
One Dallas Feeder for use in connection with the Cincinnati 500-ton Press, serial number 38743
One Rowe Reel for use in connection with the Cincinnati 500-ton Press, serial number 38743
One Cincinnati 500-ton Press, serial number 39051
One Verson 1,000-ton Press, serial number 25172
One Niagara Shear, serial number 61373
One Tannwitz Saw, serial number 15883
One Foley Saw Filer, Model 387
One Rockwell Drill Press
One Thorbob Bench Grinder
One Peer Spot Welder, serial number 13435
One Lincoln Arc Welder, serial number 246886
One Lincoln Arc Welder, serial number 246794
One Quincy Air Compressor, serial number 954830–L
One Catch Hole Punch Press
One Baron Blakelslee Degreaser
One Chicago D&K 150-ton Flange Brake, serial number P9687
One Chicago D&K Power Brake, serial number L17540
Three Semi-automatic Body Saws
One Round Corner "A" Punch, serial number 40720
One Square Corner "A" Punch, serial number 50968
One Welty-Weigh Uncoiler, serial number UC7792
One Welty-Weigh Slitter, serial number 67707
One Welty-Weigh Stacker, serial number SC7703
One Body Side Panel Punch Unit
One Ingersoll Rand Air Compressor, serial number 23408
One steel coil crane system
One basket and rack system
One scrap conveyor system
Five forklifts
Dies and fixtures sufficient to make the following part numbers, or such other dies and fixtures agreed to by an eligible person:

Tops	Bodies	Bridges
10	140	28 A Steel
20	427	Copper, Bronze
28	499	50 A Steel
50	700 Embossed	Copper, Bronze
70	750	27 A Steel
70 Embossed	427 A	Copper, Bronze
200	427 A Embossed	200 A Steel, Copper
32 A	490 A	# 1 Oversize
35 A	750 A	32 A
37 A	770 A	35 A
37 A Embossed	790 A	37 A
38 A	809 A Steel	38 A
37 A Stainless	Copper, Bronze	10
Steel	990 Steel	20

Tops	Bodies	Bridges
Full Couch Cap	Copper, Bronze	50
Steel, Copper	427 A Stainless Steel	28
Bronze	110	200
Half Couch Cap	120	70
# 1 Oversize	150	Cap ovals
28–AR	180	
	200	
	700	
	809–AR and bottom filler plates	

Bottom
Universal

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

Docket 9118. Interlocutory Order, April 28, 1983

ORDER DENYING PETITION FOR RECONSIDERATION

On February 21, 1983, the Commission issued its decision and final order in this matter. On March 11, 1983, respondent filed a petition for reconsideration under Rule 3.55 of the Commission's Rules of Practice. Respondent argues that a regulation promulgated by the Indiana State Board of Dental Examiners on May 8, 1982, "conflicts with the mandates of the Commission's recent Order . . . [and] compels reconsideration of the Commission's rejection of the state action exemption." (Petition at pp. 6–7)

Any petition filed under Rule 3.55 "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Since respondent made no effort to apprise the Commission of the state regulation before the Commission issued its decision and order, respondent is now hard pressed to argue that the order raises questions upon which it had no earlier opportunity to argue before the Commission. Nevertheless, the Commission has considered respondent's petition on the merits and found it unpersuasive.

The regulation provides in relevant part: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [reimbursements by a third party] are based is practicing dentistry and must be a dentist. Indiana dentists shall not knowingly submit dental diagnostic materials to any party involved in the Unauthorized Practice of Dentistry." 828 IAC 1–4 (Indiana Register, Vol. 5 Number 5, pp. 992–3, May 1, 1982). Clearly this regulation has no relevance to respondent's state action defense in this case, which concerns conduct engaged in by respondent only up to the time the record was closed in 1979. A regulation promulgated in 1982 cannot, as complaint counsel note, retroactively immunize prior unlawful conduct. Furthermore, even if the regulation had been in effect during the relevant time period, it would not have compelled the concerted action in which respondent engaged. Respondent asserts that the use of the plural word "dentists" in the regulation must mean that Indiana dentists are required to comply *as a group* and, consequently, must conspire together to enforce the regulation among their fellows. This creative analysis exceeds the bounds of reasonableness.

Contrary to respondent's assertion, the opinion in *Gambrel* v. *Kentucky Board of Dentistry,* 689 F.2d 612 (6th Cir. 1982), is not instructive in this matter. *Gambrel* concerned a state board of dentistry's interpretation of a state statute as forbidding dentists from providing prescriptions for dentures directly to consumers. The court upheld the decision in this private suit that the state board's enforcement activity and the *individual* conduct of dentists subject to the statute were protected by the state action doctrine. In *Gambrel* there was no evidence of collective behavior by dentists. 689 F.2d at 20.

Respondent asserts that the Commission's order "would place Indiana dentists in a position of choosing between compliance with the new dental regulation, and compliance with the Order." (Petition at p. 17) However, the Commission's order plainly pertains only to activity engaged in by the Indiana Federation of Dentists or a successor organization, acting as an organization, or by its officers or representatives, acting on behalf of the organization. The individual conduct of IFD members is expressly excluded from the order. The order does not even govern the collective conduct of some IFD members, so long as that conduct is not performed by or on behalf of the federation or a successor organization. (However, such concerted conduct might constitute an unfair method of competition subject to challenge under the Federal Trade Commission Act.) Respondent is correct in interpreting the order to prohibit IFD from adopting a policy against the submission of x-rays or other materials to third-party payers or from "coercing any third-party payer to operate or deal in any particular way." (Petition at p. 21) But since the order deals only with collective conduct, and the state regulation concerns only individual conduct, there is no conflict between the two.

Furthermore, the evidence in the record of the Commission's proceeding indicates that none of the targets of respondent's boycott were involved in the unauthorized practice of dentistry as now prohibited by the state regulation. The regulation provides: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [third party] benefits are based is practicing dentistry and must be a dentist." 828 IAC 1–4–2. Contrary to respondent's assertion, the record does not demonstrate that changes in treatment are recommended by non-dentist employees of dental insurers in Indiana. Rather, all the evidence indicates that lay employees of insurers can only approve claims for reimbursement or refer them to a dental consultant for evaluation.

Respondent has also argued that the order is unclear and overbroad. Since the language to which respondent refers was contained in the draft order accompanying complaint counsel's answering brief, it is not a matter upon which respondent can claim to have had no

previous opportunity to argue. Nevertheless, the Commission has considered respondent's concerns and concluded that its fears are unfounded.

Respondent states that it is unclear whether officers and representatives of IFD are prohibited from engaging on an individual basis in conduct forbidden to IFD. Officers and representatives of IFD are members of that organization. Since the conduct of IFD members acting individually is expressly excluded from the order's effect, it follows *a fortiori* that the prohibition on conduct by "respondent . . . and its officers and representatives" refers only to conduct by or *on behalf* of IFD.

Respondent's other concern is that the order may preclude IFD from lobbying or encouraging the Indiana Board of Dental Examiners to take action that "may result in the effect proscribed by the Commission's Order." (Petition, p. 24) However, any effort by the Commission to preclude a respondent from exercising its First Amendment rights would be constitutionally impermissible. Therefore, the only reasonable interpretation of the order is that the Commission did not intend, in prohibiting conduct that might have the "effect" of requiring that dentists not submit requested materials to third-party payers, to prohibit IFD from engaging in activities that are protected by the Noerr-Pennington doctrine.

Respondent may at some future time identify certain conduct in which it may wish to engage as an organization and which it believes is or may be prohibited by the Commission's order. The appropriate course for respondent at that time would be to seek informal advice from compliance staff, to seek an advisory opinion, or to file a request to reopen and modify the order under Rule 2.51. A request for modification must show that a change in the Commission's order is compelled by changed conditions of law or fact or by the public interest.

Accordingly, respondent's petition is hereby denied.

IN THE MATTER OF

ALLIED CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3109. Complaint, May 17, 1983—Decision, May 17, 1983

This consent order requires a Morristown, N.J. producer and seller of three high-purity acids, among other things, to divest Hi-Pure Chemicals, Inc. (Hi-Pure) within 15 months from the effective date of the order. Hi-Pure, acquired from Fisher Scientific Company (Fisher), must be divested absolutely and in good faith as a viable business concern to a Commission-approved buyer. Further, respondent is required to grant Hi-Pure's acquirer a ten-year royalty-free nonexclusive license to patents owned or applied for by Fisher which are used by Hi-Pure in the manufacturing or packaging of any of the three high-purity acids. Additionally, the company is barred for a period of ten years from acquiring any business entity engaged in the manufacturing or packaging of high-purity acids, without prior Commission approval.

Appearances

For the Commission: *Rendell A. Davis, Jr.*

For the respondent: *Bertram M. Kantor, Wachtel, Lipton, et al.,* New York City and *Brian C. Mohr, Skadden, Arps, Slate, Meager & Flom,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Allied Corporation ("Allied"), a corporation subject to the jurisdiction of the Commission, intends to acquire the Fisher Scientific Company ("Fisher") and Fisher's wholly-owned subsidiary, Hi-Pure Chemicals, Inc. ("Hi-Pure"), both corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definition

1. For the purposes of this complaint the following definition shall apply: *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

II. Allied

2. Allied is a corporation organized and existing under the laws of the State of New York with its principal office at Columbia Road and Park Ave., Morristown, N.J.

3. Allied is a diversified company engaged in the production and sale of chemicals, plastics, oil, gas, electrical products, refractories, seat belts and other products.

4. Allied is one of the leading manufacturers in the production and sale of high-purity acid in the United States.

5. In 1980, Allied had total sales of approximately $5.5 billion and total assets of approximately $4.5 billion.

III. Fisher

6. Fisher is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at 711 Forbes Avenue, Pittsburgh, Pennsylvania.

7. Fisher produces and sells laboratory equipment and laboratory chemicals.

8. In 1980, Fisher had net sales of approximately $424 million and total assets of approximately $190 million.

IV. Hi-Pure

9. Hi-Pure is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at R.D. No. 3 (Edelman), Nazareth, Pennsylvania.

10. Hi-Pure is a wholly-owned subsidiary of Fisher.

11. Hi-Pure manufactures and sells substantial quantities of high-purity acid.

12. In 1980, Hi-Pure had net sales of approximately $4.5 million (including sales to Fisher) and total assets of approximately $1.9 million.

V. Jurisdiction

13. At all times relevant herein Allied, Fisher, and Hi-Pure have been engaged in the production and sale of high-purity acid in interstate commerce and Allied, Fisher, and Hi-Pure are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15

U.S.C. 12 *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*

VI. The Acquisition

14. On or about July 30, 1981, Allied announced a tender offer for 47% of the outstanding common stock and all of the 8–1/2% convertible subordinated debentures of Fisher. On or about July 30, 1981, Allied and Fisher entered into an agreement which provides, *inter alia,* for the acquisition of Fisher by Allied.

VII. Trade and Commerce

15. The relevant lines of commerce are the manufacture and sale of high-purity nitric acid, the manufacture and sale of high-purity hydrochloric acid, and the manufacture and sale of high-purity hydrofluoric acid.

16. The relevant section of the country is the entire United States.

VIII. Actual Competition

17. Allied and Hi-Pure are now and have been for many years actual competitors in the manufacture and sale of high-purity acid.

IX. Effects

18. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) substantial actual competition between Allied and Hi-Pure in the relevant markets may be eliminated;

(b) substantial actual competition among competitors generally in the relevant markets may be lessened;

(c) concentration in the relevant markets may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other high-purity acid producers in the relevant markets may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in such markets; and

(e) barriers to entry into the relevant markets may be increased.

X. Violations Charged

19. By reason of the foregoing, the proposed acquisition by Allied of Fisher constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of the acquisition of Fisher Scientific Company by Allied Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Allied Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at Columbia Road & Park Ave., Morristown, N.J.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this Order,

(a) *respondent* means Allied Corporation, its subsidiaries, affiliates, divisions, successors, and assigns;

(b) *Hi-Pure* means Hi-Pure Chemicals, Inc. and also means all assets of Fisher Scientific Company, and its subsidiaries, affiliates, and divisions, which are located at Nazareth, Pennsylvania and which are used in the manufacture or sale of high-purity acid;

(c) *Fisher Scientific Company* means Fisher Scientific Company and its subsidiaries, affiliates and divisions; and

(d) *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

I

It is ordered, That, within 15 months from the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, respondent shall divest absolutely and in good faith all of Hi-Pure as a viable business concern to a third party that represents that it intends to use the assets of Hi-Pure in the manufacture, distribution or sale of high-purity acid in the United States. Pending divestiture, respondent shall neither make nor permit any deterioration of Hi-Pure, except for normal wear and tear, that may impair its operating abilities, competitive viability or market value.

II

It is further ordered, That in connection with any divestiture made pursuant to Paragraph I of this Order, respondent will grant to the acquirer of Hi-Pure a royalty-free nonexclusive license for a term of ten years to all patents owned or applied for by Fisher Scientific Company on the date that this Order becomes final and which on said date are used by Hi-Pure in the manufacture or packaging of high-purity acid.

III

It is further ordered, That respondent, for a period of ten (10) years from the date this Order shall become final, shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission, any assets of or any stock interest in any company engaged

in the manufacture of high-purity acid in the United States (other than products, machinery, and equipment sold by any such company in the normal course of business and nonexclusive patent and know-how licenses); *provided, however,* nothing in this Paragraph III prohibits respondent from acquiring stock for investment purposes only which does not exceed one (1) percent of the outstanding shares of equity securities in any such corporation. As used in the preceding sentence, the phrase *assets* shall refer to assets relating to the manufacture or sale of high-purity acid in or to the United States.

IV

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of Paragraph I of this Order, respondent shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply with, is complying with, or has complied with that provision. All such reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of properties specified in Paragraph I of this Order, and the identity of all such parties. Respondent shall furnish to the Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, respondent shall submit to the Commission a verified written report setting forth the manner and form in which it has complied or is complying with this Order.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Douglas did not participate. Chairman Miller voted in the negative.

IN THE MATTER OF

E. & J. GALLO WINERY

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2836. Consent Order, Aug. 26, 1976—Modifying Order, May 18, 1983

This order reopens the proceeding and vacates in its entirety the order issued on Aug. 26, 1976 (88 F.T.C. 256). The order, which was due to expire by its terms on Aug. 26, 1986, prohibited respondent from engaging in exclusionary marketing practices.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON AUGUST 26, 1976

On September 23, 1982, respondent E. & J. Gallo Winery ("Gallo") filed a Petition requesting that the Commission reopen the proceeding in Docket No. C–2836 and set aside the Order. Absent Commission action, the Order would expire by its terms on August 26, 1986. The Petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Four timely comments were received requesting that the Commission deny Gallo's Petition. Thereafter, in response to requests of various parties, the Commission allowed further opportunity for comment upon all matters, including information released only after the first comment period had closed. Five comments have been received in the latest comment period which expired on April 29, 1983. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days of filing Gallo has voluntarily waived this deadline.

The complaint and Consent Order in this matter were issued in 1976. They were based on the belief that Gallo had a dominant position in the sale and distribution of wine in the United States and had used its market power to lessen or restrain competition in violation of Section 5 of the Federal Trade Commission Act. After the complaint and Consent Order in this matter were issued, the Commission issued decisions in *Coca-Cola Bottling Co.,* 93 F.T.C. 110 (1979), and *Heublein, Inc.,* 96 F.T.C. 385 (1980), concerning the domestic wine market. The records in these cases predated the factual information which gave rise to the complaint in Gallo.

The complaint and resulting Consent Order against Gallo reflected the Commission's concern that the domestic wine market in the mid-1970's was sufficiently concentrated to warrant close scrutiny, par-

ticularly since Gallo was then, as now, the market leader. Moreover, the Commission was concerned that Gallo may have used its dominant market position to establish and maintain exclusive dealing practices with its distributors. The Commission also believed, as evidenced by the allegations in the complaint, that: wine sales were either declining or at least stabilizing; there were no new entrants at the manufacturing level; Gallo's market share was increasing while concentration of domestic wine supply was rising; and entry barriers were substantial, in part, because of the perceived difficulty of obtaining access to distribution at the wholesale level.

In its Petition, Gallo argues that the structure of the wine market has changed, with concentration declining, demand increasing, significant new entry and low entry barriers. (Petition at 9–17). Gallo also asserts that the Commission's decision in *Coca-Cola* undercuts the rationale of the consent, especially with respect to whether distribution barriers are high at the wholesale level. (Petition at 17–19). In addition, Gallo claims that the consensual vertical practices prohibited by the Order are now analyzed under a rule of reason by the courts and the Commission and are almost always found to be procompetitive or neutral. *See, e.g., Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *In re Beltone Electronic Corp.*, 100 F.T.C. 68 (1982). Gallo contends that the Order hinders it from developing effective distribution programs that will promote interbrand competition. (Petition at 20–21).

The principal thrust of the comments filed in opposition to the Petition is that Gallo will engage in exclusive dealing to the detriment of competition if the Order is vacated in its entirety. (*See, e.g.*, November 5, 1982 Comment of Albert Kramer, Esquire, Cohn and Marks, on behalf of anonymous distributor; November 5, 1982 and January 6, 1983 Comment of Howrey & Simon on behalf of Heublein; November 5, 1982 Comment of Michael J. Keady, Esquire, on behalf of an unnamed winery. *See also, e.g.*, April 28, 1983 Comments of Wine and Spirits Wholesalers of America, Inc.; April 29, 1983 Additional Comments of the Wine Spectrum.) These commenters contend that Gallo has the market power to impose exclusive dealing on distributors and that such action would raise entry barriers by restricting supplier access to wholesale distributors.

The Commission's decisions in *Coca-Cola* and *Heublein* paint a somewhat different picture of the wine market than is implicit in the Gallo complaint and Consent Order. Rather than describing a market with stable or declining demand and increasing concentration, these decisions reveal that the market was experiencing rapid growth during the periods in question. In addition, concentration was at moderate levels and increasing only slightly, if at all. Of even greater

import, the Commission in *Heublein* noted that considerable entry had occurred and a large number of potential entrants existed who were capable of entering or expanding into the wine business. 96 F.T.C. at 590–91. While not specifically addressing the extent of entry barriers, the Commission's analysis indicates that potential entrants, particularly those in the spirits and beverage business, face no major obstacles to entering the wine market. In discussing the issue of supplier leverage vis-a-vis distributors, the Commission concluded that no significant potential for leverage existed—distributors appeared capable of resisting supplier pressure aimed at forcing dealers to carry a particular brand or line of products. 96 F.T.C. at 599. To be sure, the decision in *Heublein* did not specifically address the issue of exclusive dealing, nor did it suggest that all non-price vertical restraints in the wine market are legal, but it clearly casts doubt on the continued validity of the market assumptions that underlie the Gallo Order.

Apart from evidence presented concerning the competitive state of the wine market, the Petition also makes a strong case for eliminating many of the Order's prohibitions. The Order strictly limits the financial information Gallo can obtain from its distributors as well as any financial assistance that it may seek to provide to wholesalers. In addition, the Order places undefined limits on the extent to which Gallo may restrict the extra-territorial sales of its distributors. Finally, the Order prohibits any kind to tying or requirements arrangement and limits Gallo's ability to influence distributor inventory practices. These restrictions go far beyond concerns about exclusive dealing and the financial limitations, in particular, are highly regulatory in nature. (September 16, 1982 letter from Professor Lawrence A. Sullivan to Jack Owens, Vice President and General Counsel for Gallo). The information submitted indicates that other wine suppliers use a variety of devices, including brand dedication requirements, to induce distributors to provide more effective promotional services. Although Gallo is permitted under Section II(2)(3) of the Order to terminate dealers for cause, the broad scope of the Order's prohibitions appears to hinder unnecessarily Gallo's ability to utilize many of the marketing devices that are freely employed by its competitors. The fact that some competitors utilize a practice does not, of course, make that practice lawful for all firms, irrespective of their market power. But the conditions in the wine market make it unlikely that competitive injury would result if Gallo were allowed greater flexibility in devising effective distribution programs. Thus, the Commission finds no reason to continue these provisions of the Order.

A closer question is raised by Paragraph I(3)(2) of the Consent Order, which prohibits exclusive dealing, and is the principal focus of the

objecting commenters' concerns. After careful consideration of all comments submitted, the Commission has concluded that this portion of the Order, as well, should be set aside. We believe that the factual considerations identified by Gallo in its petition, and by the Commission in the *Coca Cola* and *Heublein* decisions, indicate that Paragraph I(3)(2) is not necessary or reasonably related to the prevention of competitive harm, and thus can only operate to chill procompetitive conduct by Gallo (*e.g.,* brand dedication efforts) that is open to its competitors. A blanket prohibition upon exclusive dealing is not necessary under all the facts presented, because Gallo's widespread resort to exclusive dealing arrangements would likely be thwarted by the competitive structure of the wine industry, while such resort to exclusive dealing as Gallo might attempt is unlikely to foreclose competitors from needed distributional outlets.

In reaching our conclusion, we do not suggest that use of exclusive distribution arrangements would be lawful in this market under every conceivable market scenario. That would remain to be determined on a case by case basis under the rule of reason. We conclude simply that under all the particular circumstances of this case the likelihood of competitive harm is sufficiently remote that it is in the public interest to vacate the blanket prohibition on exclusive dealing contained in the Order.

Therefore,

It is ordered, That the Order of August 26, 1976 in this matter be, and it hereby is, set aside.

Commissioner Bailey dissented. Commissioner Pertschuk did not participate.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

I oppose the Commission's decision to grant in full Gallo's petition to reopen and to vacate a 1976 consent order because of my concern about potential anticompetitive exclusive dealing in the wine industry. I support much of the relief requested by Gallo, except for that order provision barring efforts by Gallo to condition continued distribution of its wines on the exclusion of competing brands. I do believe that some relaxation of even this order provision is justified, in order to permit reasonable and non-discriminatory minimal performance standards on the part of wholesalers of Gallo products. These might include brand dedication efforts, such as some kind of volume sales requirements, forms of promotion and store display, inventory level standards, and assurances of dealer financial stability.

I am concerned by the public record comments received from participants in the wine industry who object to our vacating the exclusive

dealing aspect of the Gallo petition. They have argued that vacating the entire order is unjustified because even the existing proscriptions permit Gallo to impose legitimate reasonable brand dedication requirements on wholesalers. They believe that exclusive dealing is potentially a genuine problem because of Gallo's role as the wine industry's "dominant" firm. They have argued that Gallo's inherent market power stems not just from its national market share (in excess of 25%), but from its market share edge over all other competitors. Gallo's market share in some geographic areas may even exceed its position nationwide. Gallo is larger than its next several rivals combined, has maintained this share by capturing more market growth than have its competitors, and throughout has remained the firm with the most desirable "full-line" offering of wine products. The thrust of all these arguments is that Gallo may have the ability to force wholesalers in at least some major markets to decide between carrying Gallo products, which may account for a fourth of sales or more, and the products of other major competitors. Gallo apparently engages even now in exclusive dealing in eleven major markets through wholesalers controlled by Gallo or Gallo executives.

To counter these concerns, the argument is made that barriers to entry into wine wholesaling are so low that any Gallo efforts at exclusive dealing will only cause new wholesaling outlets to appear and carry the lines ousted from wholesalers electing Gallo-only distribution. While it is true that there are few technical obstacles to entry into wine wholesaling, it also appears to be the case that this business is characterized by high volume/low margin sales, with only a half-dozen or fewer incumbent wholesalers serving most urban markets. Most markets, being saturated, may be unattractive to new distributors of the size needed to ensure profitability.

Finally, Gallo has argued that the order places it at a competitive disadvantage because the order inhibits its distributional efficiency. Given Gallo's steady and longterm role as the largest and most successful of the nation's wine distributors, and its success in exploiting market growth so as to retain its overall market share, I do not see how Gallo has demonstrated that the Commission's order has hampered the success of its marketing practices.

The Commission has also taken notice of its decisions in the *Heublein* and *Coca-Cola of New York* Section 7 wine merger matters as creating a "special circumstance" justifying application of the facts of those cases to the Gallo petition. Those merger cases did not focus on exclusive dealing, or the acts, practices and market position of the Gallo wine firm, or even, in detail, the subject of wine wholesale distribution. They do not compel the granting of the Gallo petition, particularly with regard to any specific Gallo decision that might be

made to require wholesalers to exclude competing brands in Gallo's favor.

Respondent bears the burden of proof that altering any part of an FTC order is justified. With respect to exclusive dealing, I believe Gallo has failed to meet this burden, even though the Commission retains the right to sue Gallo in the future if any of its actions amount to violations of the antitrust laws under a rule of reason analysis. The course of action that I proposed as a substitute for the Commission's decision would have permitted Gallo all the relief it seeks, except with respect to a single course of action, which Gallo neither proves it needs nor states that it intends, yet which was a vital part of the original FTC settlement that respondent agreed to in 1976.

My fear is that the vacation of the Commission's order encourages exclusive dealing by Gallo in at least some large and important markets, and that such a signal in the marketplace is an ominous portent for product distribution in other industries.[1]

[1] *See*, for instance, a discussion of efforts to establish exclusive distributorship in the beer industry, *National Journal*, April 2, 1983, p. 1.

IN THE MATTER OF

BEATRICE FOODS CO., ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9112. Complaint, June 29, 1978—Final Order, May 26, 1983

This Final Order dismisses the complaint challenging Beatrice Foods Co.'s acquisition of Tropicana Products Inc. The Commission found that the loss of actual competition in the ready-to-serve orange juice industry was too little to establish a violation of the Clayton Act.

Appearances

For the Commission: *Katherine Boland, Layn R. Phillips, Timothy B. Walthall* and *AnnThalia Lingos.*

For the respondents: *Edward L. Foote, John W. Stack, David S. Acker, Jerome W. Pope* and *Sidney Margolis, Winston & Strawn,* Chicago, Ill. for respondent Beatrice Foods Co. and *Robert R. Feagin, III, Holland & Knight,* Tallahassee, Fla. for respondent Tropicana Products, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement and Beatrice has also entered into a stock purchase agreement, each of which, if effected, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreements constitute violations of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

1. For the purpose of this complaint, the following definition shall

apply: *ready to serve orange juice* is chilled single strength orange juice.

II. BEATRICE FOODS CO.

2. Beatrice Foods Co. (Beatrice), is a corporation organized, existing, and doing business under the law of the State of Delaware, with its principal place of business at 120 South LaSalle Street, Chicago, Illinois. [2]

3. Beatrice is engaged in the processing and distributing of food products and related dairy products, and in the manufacturing and distribution of various other products. Beatrice operates the nation's third largest dairy system. In its fiscal year ending February 28, 1977, Beatrice had total net sales of $5,288,577,780 and net earnings of $182,566,209.

4. As a part of its food processing and distributing activities, Beatrice in the past has and continues to purchase bulk frozen orange juice concentrate for the purpose of reconstituting it into ready to serve orange juice. Beatrice has ready to serve orange juice for resale.

III. TROPICANA PRODUCTS, INC.

5. Tropicana Products, Inc. (Tropicana) is a corporation organized, existing and doing business under the law of the State of Florida with its principal place of business at 1001 13th Avenue East, Bradenton, Florida.

6. Tropicana is engaged in, among other things, processing and distributing citrus products. In its fiscal year ending August 31, 1977, Tropicana had total net sales of $244,583,000 and net earnings of $22,461,000. In 1977, Tropicana ready to serve orange juice was the largest selling brand in the United States. Tropicana sells ready to serve orange juice to others, such as Beatrice, for resale to grocery stores.

IV. JURISDICTION

7. At all times relevant hereto, Beatrice and Tropicana have sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE MERGER AGREEMENT AND STOCK PURCHASE AGREEMENT

8. On or about April 27, 1978, Beatrice and Tropicana entered into a merger agreement which provides, *inter alia,* for the merger of Tropicana into a subsidiary of Beatrice. Upon consummation of the merger, Tropicana will become a wholly-owned subsidiary of Beatrice. [3]

9. On or about March 4, 1978, Beatrice entered into an agreement with two private foundations, the Aurora Foundation and Bible Alliance, Inc., under which Beatrice agreed to purchase from those foundations an amount of Tropicana common stock which accounts for approximately 15.4% of the currently outstanding shares of Tropicana common stock. The purchase of such shares is to occur on October 31, 1978, or on such earlier date as Beatrice may specify in writing.

VI. TRADE AND COMMERCE

10. A relevant line of commerce in which to assess the probable competitive effects of the merger is the processing, distribution and sale of ready to serve orange juice.

11. Relevant sections of the country in which to assess the probable competitive effects of the merger are the United States as a whole and submarkets thereof.

12. The retail distribution and sale of ready to serve orange juice is concentrated, with the top 4 firms accounting for approximately 58.6% of total sales in 1976.

VII. ACTUAL COMPETITION

13. Tropicana and Beatrice are and have been for some time actual competitors of each other in the processing, distribution and sale of ready to serve orange juice and actual competitors of others engaged in the processing, distribution and sale of ready to serve orange juice throughout the United States and submarkets thereof.

14. In 1976, Tropicana's market share was nearly twice the size of its nearest competitor, with Tropicana accounting for approximately 30.5% of ready to serve orange juice sales in dollar volume and 29.0% in unit volume (gallons). In 1976, Beatrice accounted for approximately 1 to 1.7% of ready to serve orange juice in unit volume.

VIII. EFFECTS; VIOLATIONS CHARGED

15. The effects of the proposed merger may be to substantially lessen competition or tend to create a monopoly in a relevant market in violation of Section 7 of the Clayton [4] Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) substantial actual competition between Beatrice and Tropicana in the processing, distribution and sale of ready to serve orange juice in the United States and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the processing, distribution and sale of ready to serve orange juice may be lessened;

(c) Tropicana will be eliminated as the major independent competitor in the processing, distribution and sale of ready to serve orange juice;

(d) the previously existing level of concentration in the processing, distribution and sale of ready to serve orange juice will be increased and the possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other ready to serve orange juice processors, distributors and sellers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant market;

(f) processors, distributors and sellers of ready to serve orange juice may be denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

Initial Decision by

James P. Timony, Administrative Law Judge

November 21, 1980

Preliminary Statement

The complaint in this matter, issued on June 20, 1978 alleged that Beatrice Foods Co. (Beatrice) entered into an agreement to purchase stock in Tropicana Products, Inc. (Tropicana) and that Beatrice and Tropicana entered, on April 27, 1978, a merger agreement providing for the merger of Tropicana into a subsidiary of Beatrice, resulting in Tropicana becoming a wholly-owned subsidiary of Beatrice, and that these agreements violate Section 7 of the Clayton Act, 15 U.S.C. 18

and Section 5 of The Federal Trade Commission Act, 15 U.S.C. [2] 345. The effects of the merger are alleged in paragraph fifteen of the complaint to be in the processing, distribution and sale of ready-to-serve orange juice in the following ways:

(a) substantial actual competition between Beatrice and Tropicana in the processing, distribution and sale of ready to serve orange juice in the United States and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the processing, distribution and sale of ready to serve orange juice may be lessened;

(c) Tropicana will be eliminated as the major independent competitor in the processing, distribution and sale of ready to serve orange juice;

(d) the previously existing level of concentration in the processing, distribution and sale of ready to serve orange juice will be increased and the possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other ready to serve orange juice processors, distributors and sellers may be fostered, thus causing a further substantial lessening or competition and tendency toward monopoly in the relevant market;

(f) processors, distributors and sellers of ready to serve orange juice may be denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

Respondents generally denied the allegations of the complaint and raised issues involving (1) the relevant product market, (2) the relevant geographic market, (3) the type of the distribution systems used and the location and type of customers sold by Tropicana and Beatrice, (4) the barriers to entry in the ready to serve orange juice business.

Prior to the merger between Beatrice and Tropicana, the Federal Trade Commission sought a preliminary injunction against the proposed transaction. The application was denied. District [3] Court Judge George Hart determined that the two companies were not competitors in the processing, distribution and sale of ready-to-serve orange juice on a national basis in any significant amount. As a result, it did not appear likely that the plaintiff would succeed on the merits. *FTC* v. *Beatrice Foods Co. and Tropicana Products, Inc.*, [1978–2] Trade Reg. Rep. (CCH) ¶ 62,148 (D.D.C. 1978).

After a motions panel of the Court of Appeals for the District of Columbia affirmed the denial, the Commission filed a motion for rehearing alleging that the district court judge's findings of fact were insufficient to support his order. The panel vacated its previous order

and remanded the record to the district court for specific findings of fact. *FTC* v. *Beatrice Foods Co. and Tropicana Products, Inc.,* [1978–2] Trade Reg. Rep. (CCH) ¶ 62,316 (D.C. Cir. 1978) [587 F.2d 1225 (1978)]. Thereafter, the district court entered specific findings and conclusions in support of the order denying injunctive relief. *Id.* at 75,923–26.

Judge Hart found that Beatrice and Tropicana were not competitors and any competition, if present, was *de minimis. Id.* at 75,926. He further concluded that the United States was not the appropriate geographic market in which to test the actual competition.

These findings are not binding here. A preliminary injunction does not dispose of litigation on the merits but is nothing more than a tentative judgement of the litigation in order to preserve rights pending its final outcome. *Wyrough & Loser, Inc.* v. *Pelmor Laboratories, Inc.,* 376 F.2d 543, 548 (3rd Cir. 1967); *United States* v. *School District of Omaha,* 367 F. Supp. 179, 193 (D. Neb. 1973). Findings and conclusions accompanying a preliminary injunction are for purposes of justifying that particular order only and have no binding effect on any later jury or other fact finder. Nor do such findings estop either the parties or the fact finder from proceeding with the case on its merits. *Westchester General Hospital* v. *Dept. of HEW,* 464 F.Supp. 236 (M.D. Fla. 1979); *Poe* v. *Charlotte Memorial Hospital,* 374 F.Supp. 1302, 1312 (W.D. N.C. 1974); *Sierra Club* v. *Morton,* 348 F.Supp. 219 (N.D. Ca. 1972). Such a result is particularly important where, as here, the parties had extensive discovery only after the hearing on the preliminary injunction. Findings on the ultimate issues in a case can only be made after the parties have had opportunity to prepare and argue the case in detail.

After substantial discovery and pretrial motion practice, the administrative trial commenced in November, 1979, and was interrupted several times by the Commission's [4] appropriation problems[1] and by a somewhat languid and negligent file search by Tropicana in response to discovery subpoenas, which belatedly produced numbers of documents material to the issues of this case.[2] These documents were subpoenaed in May and September 1978 and finally produced in April and May 1980 well into respondents' defense hearings. Respondents offered over 500 of these documents as exhibits.[3] This offer was rejected.[4]

In their pretrial brief complaint counsel stated that the relevant product market in which to assess the probable competitive effects of the merger is the retail sale of ready to serve orange juice through

[1] Orders dated March 14, 1980, April 30, 1980 and May 30, 1980.

[2] Orders dated April 3, 1980, April 7, 1980, April 9, 1980, April 14, 1980, two orders dated May 21, 1980.

[3] Complaint counsel also offered many of the documents as exhibits.

[4] Order dated July 23, 1980.

grocery stores.[5] Because of the documents belatedly produced by respondents in the spring of 1980, this market was expanded to include "processing" and "distribution" of chilled orange juice in the retail market, complaint counsel having found documents allegedly showing Beatrice as a direct horizontal competitor of Tropicana in the processing and in the distribution of chilled orange juice for the retail market.[6]

All objections or motions now pending, not decided by implication in this decision, are hereby denied.[7] [5]

The findings of fact include references to supporting evidentiary items in the record. These references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

Tr. – References to the transcript are designated by the name of the witness and followed by the page number;
CX – Complaint counsel's exhibit, followed by its number and the referenced page(s);
RX – Respondent's exhibit, followed by its number and the referenced page(s);
CPF – Complaint counsel's proposed finding;
RPF – Respondent's proposed finding.

I. DEFINITIONS

a. *Chilled orange juice* (*COJ*) is chilled single strength orange juice made: (1) by squeezing fresh oranges, (2) by adding water to FCOJ, or (3) by thawing frozen single strength orange juice.

b. *Retail COJ market* refers to COJ sold in grocery stores.

c. *Frozen concentrate orange juice* (*FCOJ*) is prepared by taking water out of fresh orange juice and freezing the residue.

d. *Bulk concentrate* is frozen concentrated orange juice shipped in drums or tankers at temperatures below 32 F. [6]

e. *Canned orange juice* (*CSSOJ*) is single strength orange juice sold in metallic containers.

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[5] Trial Brief filed November 15, 1979 at p. 52.

[6] Order denying objection to complaint counsel's revised statement of issues, May 21, 1980. The complaint already alleged this market description. Furthermore, to avoid prejudice to respondents, they were allowed to recall any witnesses who had already testified, for the purpose of additional examination based on this market contention. Order dated May 21, 1980 at p. 2.

[7] Respondents argue that they were denied a fair hearing because of the admission into evidence of documents found in their files. Without pointing to any specific document, they make a general attack on rulings on admissability of documents. (RPF at p. 94) The thrust of the objection is that statements and opinions in documents prepared by Beatrice's advertising agency were admitted as admissions. The objection is denied. *Owens* v. *Achinson, Topeka & Santa Fe R.R.*, 393 F.2d 77, 79 (5th Cir. 1968), *cert. denied*, 393 U.S. 855; *Cox* v. *Essq Shipping Co.*, 247 F.2d 629, 634 (5th Cir. 1957)

f. *Grocery stores* are independent or chain grocery or convenience food stores.

g. *Packaging COJ*—when a milk plant buys COJ which has already been processed, puts it in containers and distributes it.

h. *Processing COJ*—making COJ from fresh oranges, bulk FCOJ, or bulk frozen fresh orange juice.

i. *Reconstituting COJ*—making COJ from bulk FCOJ by adding water and sometimes pasturizing it or adding sugar or other preservatives.

j. *Fresh COJ*—juice made by squeezing oranges. It is sometimes pasturized.

k. *Orange drink*—fruit juice with more water added than in juice which is freshly squeezed. Orange drink may be diluted by adding to orange juice water amounting to 50% up to 95% of the drink.

II. FINDINGS OF FACT

A. *The Acquiring Firm: Beatrice Foods Co.*

1. Beatrice Foods Co. ("Beatrice") is a corporation doing business under the laws of Delaware, with its principal place of business at 120 South LaSalle Street, Chicago, Illinois. (Complaint and Answers of Beatrice and Tropicana, ¶ 2)

2. In fiscal 1978, Beatrice had total net sales of $6,313,888,000 and net earnings, after taxes, of $221,538,000. (CX 194A) In 1978 Beatrice was the nation's 31st largest industrial corporation in terms of net sales, 79th in total assets and 57th in terms of net income. (CX 194A; Dutt 3794) Beatrice sells more than 8,000 products. (CX 19B)

3. Beatrice is the nation's leading diversified food company. (CX 527M, no. 49; Dutt 3793; Karnes 4799–4800) Beatrice sells more than 4,000 retail dairy and grocery products, through supermarkets and grocery stores, using 1,400 food brokers. (CX 20D; CX 31D; Karnes 4798)

4. In 1978 Beatrice was the nation's 17th largest advertiser among all industrial corporations. (CX 192B) [7]

5. In 1978 Beatrice operated the nation's third largest dairy system. (Complaint and Beatrice Answer, ¶ 3) Beatrice is the largest milk processor and distributor in the country and is more national in scope than any other dairy. (CX 509A–E; CX 1554; Karnes 4809)

6. Beatrice's dairy plants process and distribute COJ to grocery stores. (Complaint and Answers of Beatrice and Tropicana ¶ 4)

7. At all times relevant hereto, Beatrice has sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15

U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. (Complaint and Answers of Beatrice and Tropicana, ¶ 1)

B. *The Acquired Company: Tropicana Products, Inc.*

8. Tropicana Products, Inc. (Tropicana) was a corporation doing business under the laws of the Florida with its principal place of business at 1001 Thirteenth Avenue, East Bradenton, Florida. (Complaint and Answers of Beatrice and Tropicana, ¶ 5)

9. Tropicana is engaged in processing and distributing FCOJ, and other citrus juices and drinks (CX 40B–C), and is the leading processor of COJ in the United States. (Complaint and Tropicana Answer, ¶ 6; CX 40D)

10. In its fiscal year ended August 31, 1977, Tropicana had net sales of $244,583,000 and net earnings, after taxes, of $22,461,000. (Complaint and Answers of Beatrice and Tropicana, ¶ 6)

11. In fiscal 1978 Tropicana sold 106,821,648 gallons of COJ in the United States for $206,649,295. (CX 376A; CX 560Z–17)

12. Tropicana's COJ is supported by intensive brand advertising expenditures and advertisements on national television. (CX 39, p. 6; CX 38E) Tropicana COJ is sold in 48 states, with a sales force and 57 food brokers. (CX 22F, I; CX 378A–B)

13. At all times relevant hereto, Tropicana sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as [8] amended, 15 U.S.C. 12, and was a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission, as amended, 15 U.S.C. 44. (Complaint and Answers of Beatrice and Tropicana, ¶ 7)

C. *The Acquisition*

14. Mr. Richard Voell, deputy chairman of the board and chief corporate officer of Beatrice, negotiated the agreement-in-principle to proceed with the acquisition of Tropicana Products, Inc. (RX 2402A)

15. Mr. Richard Truelick, vice president of Beatrice, brought Tropicana to the attention of Mr. Voell sometime in the summer of 1977. (CX 2310A)

16. On September 14, 1977, Beatrice's senior management, other than Mr. Voell, exhibited an interest in acquiring Tropicana. (CX 318) In October of 1977, Mr. Voell received a copy of an October 18, 1977 memorandum to James Dutt, Beatrice's chief operating officer, which analyzed various possible stock exchanges between Beatrice and Tropicana. (CX 320A–G; CX 2310A) Sometime late in 1977, Mr. Voell

discussed the acquisition of Tropicana with Mr. Wallace Rasmussen, then chairman of the board and chief executive officer of Beatrice. (CX 2310A–B)

17. Mr. William Polidoro, a Beatrice dairy division official, contacted Tropicana regarding its possible acquisition in the fall of 1977. (Barnebey 4097–98)

18. At Mr. Truelick's suggestion, Mr. Voell arranged to meet with Mr. Anthony Rossi, then Tropicana's chairman and chief executive officer, on February 8, 1978. (CX 2310B; CX 321A-C; CX 322; CX 324) On February 28, 1978, Messrs. Rasmussen, Voell and Truelick met in Bradenton, Florida with Mr. Rossi and Mr. Barnebey, then president of Tropicana. (CX 319; RX 2402A-B)

19. On Saturday, March 4, 1978, Beatrice officials reached an agreement-in-principle with Tropicana officials concerning a merger between the two companies. (CX 327A-C; CX 5280, no. 65; RX 2402B) On the evening of that day, at a special meeting of Beatrice's board of directors, the agreement-in-principle was approved. (CX 2310B; RX 2402B)

20. The first public announcement of the proposed merger came in the March 6, 1978 edition of the *Wall Street Journal.* (RX 2402B) The proposed merger was mentioned at a Beatrice management meeting on March 7 or 8, 1978. (CX 528Z–21, no. 188) **[9]**

21. In April 1978, pursuant to the agreement with Beatrice, Tropicana Products, Inc., was purchased by the entity T.O.J., Inc., a wholly-owned subsidiary of Beatrice created solely for purposes of the acquisition. (Complaint and Answers of Beatrice and Tropicana, ¶¶ 8, 9) Immediately following the purchase, T.O.J., Inc., changed its name to Tropicana Products, Inc. Under the terms of the purchase arrangements, 52% of Tropicana's shares were converted into Beatrice preferred stock, and 48% were purchased outright by Beatrice for cash. Tropicana is now a wholly-owned subsidiary of Beatrice. (CX 22, Annex I, p. 1)

D. *Product Market*

a. The Retail COJ Market

22. The sale of orange juice to consumers is divided into three segments: FCOJ, COJ and CSSOJ. (CX 345A-Z–89; CX 347Z–6, Z–7; CX 353A; CX 394; CX 400A; CX 410 I-K; CX 413 I-N; CX 414C-E; CX 415B; CX 423B-D, L, R; CX 432A-C; CX 505C; CX 512A-P; CX 513L; CX 514A-R; CX 1650, p. 125; CX 2302, p. 19; Munkelt 748; Jessup 2877, 2879; Barnebey 4008)

23. COJ is recognized by members of the industry and public officials as a market separate from FCOJ and CSSOJ. (CX 6C; CX 13A-J;

CX 147; CX 149B-C; CX 353A; CX 410K; CX 412H, J; CX 413I, M; CX 414E; CX 415B-C, E; CX 432B; CX 505C; CX 512A-P; CX 513L; CX 514A-R; Munkelt 736–37)

24. Tropicana and Beatrice have recognized the existence of the COJ market in their filings with the Securities and Exchange Commission ("SEC"). (CX 22F; CX 38E; CX 39C; CX 40B, D; CX 41B; CX 42B; CX 527Z–1)

25. The Florida Citrus Processors Association ("FCPA") is a trade association of Florida citrus processors. (CX 594J, p. 4) FCPA, formerly the Florida Canners Association, collects and disseminates to its members separate data on COJ, CSSOJ and FCOJ. (CX 594J, pp. 4–6, 10, 14, 66–67; Barnebey 3992)

26. The federal and state governments have promulgated different standards for FCOJ and CSSOJ, and COJ. (CX 399C)

27. The Florida Department of Citrus ("FDC"), a state agency financed by the citrus growers, has recognized separate markets for COJ, FCOJ and CSSOJ. (Hoffer 1813, 1816–17)

28. Separate advertising campaigns for COJ are used [10] by firms which sell COJ and FCOJ and/or CSSOJ. (CX 337A-Z–21; CX 367; CX 527Z–8)

b. The Retail COJ Market is Distinct From the Institutional COJ Market

29. The COJ market is recognized by the industry as being divided into two submarkets: sales to grocery stores ("the retail market") and sales to institutional customers ("the institutional market"). (CX 505E; CX 1650, pp. 33–34; Munkelt 717–18; Lang 1049; Donovan 1297–98; Miller 1481; Jessup 2882; Barnebey 4014)

30. Tropicana recognizes the institutional COJ market as separate from the retail COJ market. (CX 523, pp. 298–99; CX 1650, pp. 168–69)

31. Industry and government documents separately report on conditions in the COJ retail and in the institutional markets. (CX 6C; CX 54A; CX 416A-H; CX 418A-E; CX 421A-E; CX 505C, E; CX 506D-E; CX 593, pp. 388–89; CX 2303F-I; Munkelt 780–81; Barnebey 4013)

32. A.C. Nielsen reports relied on by Tropicana, Minute Maid, Kraft and H.P. Hood are limited to COJ sold to the retail market. (CX 252–253; CX 593, p. 389; CX 801D; Munkelt 781, 784; Donovan 1461; Miller 1496–97, 1502, 1554; Hoffer 1825–26; Jessup 2902, 3098–99; Barnebey 3917)

33. Recognizing distinct institutional and retail markets, processors of COJ have established separate sales divisions to serve the customers in these two markets. (CX 506E; CX 1650, pp. 31–32, 56; Munkelt 716–17; Goldman 996; Donovan 1293–94, 1297–98, 1441; Miller 1481; Barnebey 4013, 4018)

34. COJ is usually sold to the institutional market in small size containers (4 oz. and 6 oz.). (CX 3H; Goldman 961; Donovan 1298) Sales of COJ to the retail market are principally made in quart, one-half gallon and gallon sized containers. (Munkelt 711; Lang 1106; Donovan 1295, 1298; Miller 1480–81; Mirapaul 1576; Hoffer 1956)

35. Brand name recognition is important in selling to grocery stores but unimportant in selling to restaurants. (Hoffer 1822)

36. Typically there are separate buyers for retail and institutional COJ. (CX 523, pp. 298–299; Donovan 1297–98, 1323) Many institutional accounts are serviced by specialized institutional wholesalers who do not sell to the retail trade. (CX 523, p. 299) [11]

37. Institutional customers usually want a commitment that COJ producers will supply them for a one year period. (Donovan 1443–45; Mirapaul 1577–80; Koch 4880) Such commitments hinder the shifting of COJ production from the institutional to the retail market. (Donovan 1443–45; Mirapaul 1577–80)

38. Retail buyers of COJ are concerned with whether consumers have been presold on the product. Institutional consumers of COJ do not know what brand they are drinking. (Donovan 1323; Mirapaul 1576)

39. There is no cross elasticity of demand between the COJ retail and institutional markets. A consumer does not choose between home consumption of COJ and institutional consumption of COJ based on the relative prices of COJ. (Munkelt 923; Miller 1495) Many factors other than the price of COJ go into a consumer's selection of a particular airline, hospital, school or restaurant.

40. In pricing COJ for sale to the retail market, processors of COJ do not consider the price of COJ in the institutional market. (CX 1650, pp. 38, 40; Goldman 963; Lang 1061–63; Miller 1495; Mirapaul 1580)

c. The Retail COJ Market is Distinct From the Retail Markets for FCOJ and CSSOJ

41. Beatrice officials recognize the separateness of the retail COJ market. (CX 141F; CX 301B)

42. Tropicana's marketing documents recognize that the COJ retail market is distinct from the FCOJ and CSSOJ retail markets. (CX 490Z–77) In its 1977 annual report, Tropicana separately analyzed its position in the retail COJ and FCOJ markets. (CX 39B) Similar separate analyses of the distinct markets for COJ and FCOJ are found in Tropicana's filings with the SEC. (CX 40D; CX 41B; CX 42C)

43. H.P. Hood Company discontinued retail FCOJ production because it was so different from retail COJ production. (Donovan 1303) Hood never considered entry into CSSOJ. (Donovan 1315)

44. The Florida Department of Citrus ("FDC") recognizes the dis-

tinct markets for COJ, FCOJ and CSSOJ in its marketing activities to promote orange juice to consumers. (Hoffer 1822–24) FDC has employed separate advertising campaigns for CSSOJ, COJ and FCOJ. (Hoffer 1822–23)

45. Tropicana and Minute Maid recognize the [12] distinctness of the retail COJ and FCOJ markets by purchasing separate sales data with respect to each from the A.C. Nielsen Company. (Munkelt 749; Jessup 2950–52)

46. None of the leading sellers of COJ has ever produced CSSOJ. (CX 1650, p. 81; Donovan 1315; Miller 1505; Barnebey 4018) Tropicana, Kraft and Hood have never considered entry into CSSOJ. (Donovan 1315; Miller 1505; CX 1650, p. 81)

47. Sellers of COJ to grocery stores, including Tropicana and Beatrice, examine the prices of other brands of COJ but do not examine the prices of retail FCOJ, CSSOJ, or other citrus juices or beverages in setting their price for COJ. (CX 593, p. 286; CX 1650, p. 43; Munkelt 750–51, 759; Goldman 963–66, 1029; Lang 1059–63, 1111; Donovan 1314; Miller 1493–94; Mirapaul 1472–74; Jessup 3140; Parker 4322–25, 4327, 4333; Koch 4937, 4940; CX 732B; CX 747A)

48. FCOJ producers do not consider the prevailing price of COJ or CSSOJ in setting their FCOJ prices. (Bock 1658)

49. Tropicana is the price leader in the COJ market. (CX 301B; CX 593, p. 423; Munkelt 760; Lang 1059; Donovan 1314; Miller 1507) Minute Maid is the price leader in the FCOJ market. (CX 301B)

50. In 1977 private label COJ amounted to about 19% of total COJ sales (CX 13G), and over 50% of FCOJ sales. (CX 353A)

51. Different production and distribution facilities are used for the three types of processed orange juice sold through retail outlets. (CX 527Z–29; CX 593, pp. 28–30, 35, 68–69; CX 1219C; CX 1650, p. 82; Goldman 988; Miller 1505; Barnebey 4018) Tropicana's FCOJ is processed in a separate building at its Bradenton facilities. (CX 593, p. 132) The production of retail pack FCOJ requires freezing equipment not used to produce COJ for the retail market. (CX 527Z–22; CX 593, pp. 29–30, 68–69; Bock 1655) The filling and packaging equipment used to produce COJ is different from that used in the production of FCOJ. (Bock 1654–55, 1660–61) A firm producing only COJ could not produce FCOJ on its equipment, and to enter the production of FCOJ would require an investment of several million dollars, part of which cost would be represented by a can plant. (Donovan 1304; Miller 1505)

52. The storage and transportation facilities used for COJ sold to retail outlets differ from those used for FCOJ. COJ is kept chilled, but not frozen, whereas FCOJ must be kept frozen at all times until it reaches the consumer. Processors transport and store COJ while keeping it at a temperature of 35–45°F and they recommend to their

customers that COJ be kept under refrigeration and stored at 35–55°F. (Munkelt 714–15, [13] 799; Goldman 967, 1004–05, 1041; Lang 1052; Miller 1489–90; Mirapaul 1570; Jessup 3051; Barnebey 4078; Koch 4910; Piskac 5170) The only exception to COJ being kept under constant refrigeration by grocery stores occurs when glass containers occasionally are put out on an aisle display for a week or two during a promotion. After such a promotion, the COJ is returned to refrigerated storage. (Goldman 1004–05; Miller 1550) If COJ in glass containers is left out at room temperature, it will more quickly deteriorate in quality by losing flavor and changing color. (Goldman 1045; Miller 1488; Mirapaul 1570)

53. The production of CSSOJ requires canning facilities whereas the production of COJ does not. (CX 593, p. 68) The storage and transport of CSSOJ differs from COJ for the retail market. (CX 2302, p. 60) COJ requires cold storage facilities and refrigerated transport while CSSOJ does not. (Munkelt 714–16, 729; Goldman 967; Lang 1051–52; Donovan 1291, 1309)

54. FCOJ suppliers use no salesmen, do no advertising or promotion for either their private or packer labels and provide no marketing assistance to its customers. (CPF 230; CX 297A; CX 593, pp. 436–37, 444; CX 1650, pp. 87–88, 99; Bock 1650; Hoffer 1822, 1869, 1873, 1978–80)

55. COJ is sold to different grocery store buyers than is FCOJ or CSSOJ. (Munkelt 714–15, 798; Goldman 964–65; Lang 1052; Donovan 1300, 1303, 1315; Bock 1650; Jessup 2770, 2927, 2956)

56. COJ is stored in a different part of the grocery store than are FCOJ and CSSOJ. COJ is typically found in the dairy case although it is also found to a lesser extent in the produce section of the grocery store. (Munkelt 714–15, 798–99; Goldman 967; Lang 1052; Donovan 1459; Miller 1489; Jessup 2926–27; Koch 4910; Piskac 5170) FCOJ is found in the frozen food case of the grocery store and CSSOJ is found in the dry grocery section. (Munkelt 714–15; Parker 4325)

57. Total COJ industry sales have been increasing at about 20% in gallons. Total FCOJ sales have been increasing at about 10% (CX 899B-C) but in 1979 total FCOJ gallon sales decreased 6% while total COJ sales increased 20%. (CX 389K, N) Of the total domestic orange juice market, FCOJ has dropped from 77.2% in 1975 to 67.9% in 1979 and COJ climbed from 18.3% to 28% during that period. (CX 13A, p. 149) The recent rapid increase in sales of COJ comes from new orange juice consumers and not from former FCOJ consumers. (Bock 1686; Hoffer 1926; Jessup 3056; Munkelt 814, 924)

58. When FCOJ is put on promotion, there is no perceptible effect on the sale of COJ in the retail market. (Goldman 965; Mirapaul 1572–73; Jessup 3056–57) [14]

59. A study done by a research economist, employed by the Florida Department of Citrus, prepared in the course of his employment and not for use in litigation, concluded that the demand for COJ was inelastic and that there were no significant substitutes for it, including FCOJ and CSSOJ. (Tilley 2232, 2236–37, 2367, 2397)

60. Consumers perceive COJ, when compared to FCOJ, as a pure 100% fresh orange juice, prepared with little processing. (Munkelt 789–90; Hoffer 1956; Barnebey 4063) The extensive growth of COJ in recent years has been due to more women working and buying COJ as a convenience product. (Hoffer 1915–17)

61. FCOJ has an indefinite shelf life if kept frozen, is more compact than COJ and can be more easily stored. (Donovan 1303; Bock 1652; Hoffer 1931; Tilley 2024–25, 2243–44; Barnebey 4063, 4084–86) Shelf life for COJ in paper cartons is about 20 to 30 days. (Munkelt 715; Donovan 1309; Barnebey 3911; Parker 4315; Piskac 5165; CX 62–B) Shelf life of COJ in glass is over one year. (Miller 1508; Barnebey 3911)

62. Consumers and industry members perceive CSSOJ as a product of inferior taste and quality. (Munkelt 790; Goldman 966; Lang 1060–61; Donovan 1315; Miller 1494, 1505; Mirapaul 1573; Hoffer 1956; Barnebey 4018–19, 4021; Parker 4340, 4406; Bock 1652–54)

d. The Retail COJ Market Includes Both COJ From Fresh Fruit and Reconstituted From Bulk Concentrate

63. COJ sold to grocery stores is processed directly from fresh oranges, bulk concentrate, bulk frozen single strength juice, or from a combination of fresh and frozen juice. (Jessup 879; Goldman 960; Mirapaul 1567; Barnebey 3983–85, 4009)

64. Retail COJ is packaged in glass, cartons or plastic, primarily of quart, half-gallon or gallon sizes. (Munkelt 710–711, 736–37; Goldman 960; Lang 1048, 1051; Donovan 1284–85; Miller 1480–81, 1496–97; Mirapaul 1567; Jessup 2876; Barnebey 3984–85)

65. During 1979, 70% of Tropicana's COJ was produced directly from fruit. (CX 2302, p. 107; Jessup 3015) Tropicana's source for its COJ varies during the year. In May it may be fresh squeezed oranges and in August it may be made from bulk concentrate. (CX 38M; CX 39C; CX 40D-E; CX 527Z–41) Throughout Tropicana's history, some of its COJ has always been [15] made from bulk concentrate. (CX 2302, p. 118) During 1978, Tropicana had a made-from-concentrate COJ on the market for six months. (Barnebey 4010; Munkelt 807)

66. H.P. Hood and Kraft process COJ for the retail market directly from fresh oranges and from bulk concentrate. (CX 678B; CX 680A, D; CX 759A; Donovan 1292, 1412; Miller 1483; Jessup 3044) H.P. Hood has processed COJ from single strength frozen blocks. (Donovan 1292)

67. Much of the same equipment used to produce COJ directly from

oranges is used to produce COJ reconstituted from bulk concentrate. (CX 382C, T-X, Z–28 to Z–32; CX 420; CX 593, pp. 138–39)

68. Producers of COJ made solely from bulk concentrate perceive themselves to be processors that are in competition with Tropicana's COJ from whatever source it was derived. (Munkelt 764, 805–06; Goldman 961, 963–64; Lang 1048)

69. Tropicana recognizes firms which process COJ only from bulk concentrate as competitors in the COJ market. (CX 752B; CX 759A; CX 951; CX 952; CX 1004B)

70. Consumers perceive little difference in COJ made from fresh oranges or from bulk concentrate. (Brick 5329; CX 2302, p. 105) In 1976 Hood switched from selling COJ made directly from oranges to reconstituting from bulk frozen concentrate. Hood changed the labeling on their carton, as required by law, to show that the COJ was reconstituted. Hood's sales increased rapidly thereafter. (Donovan 1304–06, 1308)

e. The Retail COJ Market Includes Glass, Paper Cartons and Plastic Containers

71. Members of the industry define the retail COJ market to include COJ sold in glass, paper cartons, and plastic containers. (CX 1650, p. 10; Munkelt 710–11; 736–37; Goldman 960, 1041–42; Lang 1048; Donovan 1284–85; Miller 1480; Mirapaul 1567; Bock 1654; Hoffer 1815–16, 1829–30; Tilley 2112; Jessup 2876; Barnebey 3983–84)

72. FDC, a state government agency financed by the citrus growers and an information center for the industry, includes COJ in glass, cartons and plastic containers under its definition of COJ as used in its official rules. (Hoffer 1815–16)

73. FCPA, the industry trade association, defines COJ in its reports and internal membership division to include COJ packaged in glass, cartons and plastic containers. (CX 594J, [16] pp. 10–11; Barnebey 3991)

74. Tropicana, Johanna Farms, Home Juice Company, Pure Foods and Bodines sell COJ in glass, paper and plastic containers (CX 1650, pp. 94–95; Goldman 960–61; Lang 1051; Mirapaul 1567–68; Jessup 2781–82) Hood sells COJ in paper and plastic containers. (Donovan 1285) Kraft sells COJ under its Sealtest label in glass and paper containers and under its Kraft label in glass. (Miller 1481, 1483–84) Minute Maid sells COJ only in paper cartons but sold in glass in a test market in upstate New York from 1971–1976. (Munkelt 711, 763) Prior to the merger, Beatrice sold COJ in glass, paper and plastic. (CX 47)

75. Tropicana marketing reports recognize the close relationship of COJ packaged in cartons, glass and plastic. (CX 661D; CX 662D; CX

665B, F; CX 666B; CX 671A; CX 739A; CX 741A; CX 951A; CX 987E; CX 988E; CX 1086C; CX 1111C; CX 1143B; CX 1145B; CX 1176; CX 1280D; CX 1342B)

76. In their pricing of one container type of COJ, sellers take into consideration the prices of other types of containers of COJ. (Munkelt 759–60; Goldman 963, 970–71; Mirapaul 1574) In pricing its COJ, Minute Maid which sells only cartons, takes into consideration the price of the Kraft brand of COJ which is sold only in glass. (Munkelt 711, 759–60; Miller 1480–81) Beatrice's Mattoon, Illinois, plant which processed COJ only in plastic containers examined the prices of competing COJ, including Tropicana's, packaged in glass or paper cartons. (Parker 4322–24, 4327) Beatrice's Dayton, Ohio plant which processed plastic gallons of COJ and sold glass quarts and half-gallons, examined the retail prices of Borden's paper half-gallons. (Koch 4936–40)

f. The Retail COJ Market Includes COJ Sold Through Various Distribution Systems

77. Processors of COJ for the retail market sell to chain stores, independent wholesale warehouses, individually owned grocery stores, dairies, and distributors who are independent routemen who own their own truck but no storage facilities. (CX 593, pp. 18, 86–87; CX 947G; CX 1070C; CX 1232; CX 1650, pp. 125–26; Lang 1067, 1094–96; Donovan 1309; Jessup 2763–65) Their COJ arrives at chain stores by sale and delivery to: (a) the warehouse of the chain; (b) individual stores of the chain; or (c) dairies or distributors who deliver to the individual stores of the chains. (CX 593, p. 45; CX 661A; CX 741A; CX 1070C; CX 1188A; CX 1650, p. 102; Lang 1063–64; Donovan 1309, 1354, 1359, 1366–68; Parker 4330) They also sell COJ to chain stores through dock pick up by the chain at the processor's facility or through dock pick up by distributors. (CX 593, p. 151–52; CX 1217B; Munkelt 836–37; Lang 1094–95; Donovan 1378; Mirapaul 1590–91; Davis 3170; Parker 4330–31, [17] 4383; Koch 4931) Sometimes a chain store will purchase COJ both for delivery at its warehouse and delivery to its stores. (CX 915F; CX 1111B; CX 1113A; Donovan 1354) Small chains and non-chain grocery stores receive delivery of COJ from: (a) warehouses of wholesalers; (b) dairies; (c) independent routemen; or (d) processors. (CX 593, p. 346; CX 1232; Lang 1067–68, 1109; Jessup 2765, 2894, 2954)

78. In the past few years, processors have increasingly delivered COJ to the warehouses of chain retail stores. (CX 1005B; Lang 1064; Donovan 1311–12)

79. Home Juice originally delivered COJ directly to individual grocery stores but now relies on deliveries by its customers, including

chain store warehouses, independent distributors and dairies to reach grocery stores. (Lang 1063–64, 1067, 1094–96, 1109)

80. Johanna Farms delivers COJ to chain store warehouses and makes store-door delivery to other grocery stores. (Goldman 972–73, 994) It also sells to independent distributors who deliver its products. (Goldman 974) In the past 10 years its sales of COJ to warehouses has increased. (Goldman 1019)

81. H.P. Hood also increasingly relies on sales to grocery stores through warehouse delivery and store-door delivery. (CX 505E; CX 752B; CX 760B; CX 1005B; CX 1006A; CX 1178B; Donovan 1309, 1311–12) Hood began warehouse delivery in 1975 in trailerload quantities directly to chain store warehouses instead of to their individual stores. (CX 505E; CX 760B; CX 1178B)

82. Dairies such as Dean Foods, Knudsen, Sealtest and Western General Dairies process and sell COJ to grocery stores both by delivery to chain warehouses and by store-door delivery to individual grocery stores. (Goldman 972–73; Lang 1063–64, 1108; Donovan 1309, 1354; Jessup 2866, 2919, 3045–47; Barnebey 4075–76)

83. In its early history Tropicana delivered its COJ in its own trucks in less than truckload lots. (CX 593, p. 10) Tropicana now distributes COJ by delivery to warehouses of chain stores, wholesale warehouses and dairies. (CX 593, pp. 44–45, 347; CX 919; CX 1650, pp. 125–26, 130; Jessup 2764–66; Barnebey 4078–79) In New York City, Boston and Miami it sells to independent routemen who deliver store-door to retail grocery stores. (Barnebey 4044, 4047–48) These routemen own their trucks, take title to the COJ, and pick it up at the Tropicana terminal. (CX 593, p. 150; Barnebey 4047)

84. Beatrice milk plants deliver COJ for the retail market to individual units of chain grocery stores, to [18] independent groceries and to wholesale distributors. These milk plants also distribute COJ through independent routemen who pick it up at the dock of the milk plant or have it delivered to their locations. (Parker 4366, 4383; Granger 4433)

85. From 1973 to 1975 the Beatrice Dayton milk plant delivered milk to the warehouse of a chain of 75–80 convenience stores and tried to sell the chain COJ at a price lowered to reflect warehouse delivery. (Koch 4952–57) In 1977 the Beatrice milk plant in Greeley, Colorado delivered COJ to the distribution facility of a chain of 46 grocery stores. (CX 528V, no. 86)

86. Beatrice and Tropicana both provide in-store help to grocery stores selling their brands of COJ. These in-store functions include checking product coding, shelf placement and rotation, and setting up displays and promotional programs. (CX 593, pp. 96–97; CX 665D-E; CX 666A; CX 672C-D; CX 768B; CX 1191B; CX 1258B, D-E; Jessup

2756–57, 2921, 2925–26; Barnebey 4066; Koch 4913–14; Piskac 5181–82) Tropicana uses brokers and salesmen and its territory managers to perform these functions. (CX 665D-E; CX 666A; CX 672C-D; CX 768B; CX 1191B; Jessup 2756–57; Barnebey 4066–67, 4080–81) Beatrice uses salesmen to perform these same in-store services. (Jessup 2927; Davis 3152, 3186; Parker 4390–91; Koch 4913–14; Piskac 5181–82)

87. Representatives of Tropicana, Minute Maid and Home Juice, while delivering COJ to warehouses, consider those who deliver on a store-door basis to be competitors. (CX 527Z–10; CX 661A; CX 667H; CX 944; Munkelt 764–65, 784–85, 850; Lang 1058–59, 1063–66)

88. Dairies delivering COJ store-door compete with producers of COJ who deliver to warehouses, sometimes displacing them in the sale of COJ to grocery stores. For example, in Tampa and Orlando, Florida, Borden COJ which was delivered store-door had the effect of decreasing Tropicana's sales of COJ at Winn-Dixie grocery stores, in part because of the advantages of store-door delivery. (CX 1321B) Similarly, in New England, Tropicana in 1975 found it difficult to compete for COJ sales with H.P. Hood's store-door delivered COJ because stores buying from Hood "get what they order, when they want it and there are very seldom *any* out of stocks on either size, in these stores." (CX 947–O) (Emphasis in original.)

89. Tropicana's north central division manager, Mr. Jessup, considers dairies that reconstitute and sell COJ on a store-door basis to be competitors of Tropicana. (Jessup 2905–15) Mr. Jessup's marketing reports to Tropicana's management discuss this competition. (CX 681B; CX 682B; CX 685B; CX 686B; CX 687B; CX 688B; CX 690B; CX 691B; CX 692B; CX 695B-C; CX 696B; CX 697B; CX 698B; CX 699C; CX 701B; CX 702B; CX 703C; CX 704C; CX 705C; CX 706B; CX 707B; CX 708B; CX 709B; CX 710B; CX 711B; [19] CX 712A; CX 713B; CX 714B; CX 715B; CX 716B; CX 717B; CX 718B; CX 1110B; CX 1111B; CX 1112B; CX 1113B; CX 1114B; CX 1115B; CX 1116B; CX 1117B) Tropicana has lost some customers to such dairies engaged in store-door delivery of COJ. (Jessup 2906)

90. Mr. Woerner, Tropicana's western division manager, considers dairies who delivered COJ on a store-door basis to be competitors of Tropicana. (CX 661A, D; CX 663; CX 670A; CX 672D; CX 666B) His weekly sales reports show sales lost by Tropicana and Minute Maid to dairies which were engaged in store-door delivery. (CX661A, C-D; CX 666B; CX 672D) These reports show that Tropicana lost sales to the 7–11 stores in Salt Lake City because of COJ packed by a Beatrice dairy and sold to that chain. (CX 661A; CX 663C) Another dairy in that market, Western General Dairies, was selling Dr. Lukes COJ at a low price in 1976, and Mr. Woerner told the Tropicana representa-

tive to keep a close watch and: "If we seem to be getting hurt, will advise so we can take appropriate corrective action." (CX 661D)

91. Tropicana's internal marketing summaries submitted to its top officer by its sales manager report "competitive activity" including prices of COJ that is store-door delivered by dairies. (CX 667H [Borden]; CX 669A-B [Borden and Farmbest]; CX 678 [Farmbest]; CX 679A and C 969C [Hood])

92. A 1976 Tropicana study of COJ distribution and pricing in San Francisco listed Meadow Gold COJ and the COJ of four other dairies all sold on a store-door basis as part of the "competitive distribution in the stores contacted." (CX 807F; Dutt 3829–30) Minute Maid, which uses no direct store-door delivery, also considered Meadow Gold brand COJ to be a competitor, as well as the brands of other dairies which use store-door delivery for their COJ. (Munkelt 765, 785, 850) When setting the price for Meadow Gold COJ, Beatrice's dairy manager in Mattoon went to an IGA store and looked at the retail prices of Tropicana, Minute Maid and Kraft glass COJ because they were in the dairy case with his plastic COJ; those products are delivered to the warehouse while Meadow Gold COJ is delivered store-door. (Parker 4322–27)

93. There is a limited amount of shelf space available for COJ in grocery stores. (CX 593, p. 322; CX 661D; CX 670B; CX 737B; CX 779B; CX 947M, Q; CX 951A; CX 996A; Munkelt 767, 796; Lang 1058–59, 1065–66; Jessup 2905–06,, 2921–23; Davis 3150, 3169–70; Parker 4322 –25) Producers of COJ want shelf space in grocery stores ("facings") because loss of shelf space decreases their sales. (CX 947M; CX 996A; Jessup 2921–25) Tropicana has lost shelf space in grocery stores to processors who deliver COJ on a store-door basis. (Jessup 2922–23)

94. Minute Maid and Tropicana do not subscribe to the [20] market reporting service sold by Selling Areas Marketing Inc. ("SAMI") for COJ because SAMI reports measure shipments from grocery warehouses to retail stores and fail to include COJ that is store-door delivered. (CX 1650, pp. 143–44; Munkelt 785; CX 593, pp. 229, 457–58) Minute Maid and Tropicana do purchase A.C. Nielsen market reports which include COJ reaching grocery stores through all methods of delivery including store-door. (CX 517F, U; CX 593, pp. 228–29; Munkelt 749; Munkelt 851)

g. The Retail COJ Market Does Not Include Home Delivery

95. Home delivery of COJ is made by dairies or independent routemen who deliver dairy items and often other products along with COJ. (Complaint and Tropicana Answer ¶ 6; Goldman 974–75; Mirapaul 1581; Karnes 4765–66) COJ purchased through home delivery is more expensive than COJ sold in retail outlets. (Goldman 974–75; Donovan

1320, 1322, 1335–36; Mirapaul 1581; Parker 4387; Piskac 5110; CX 593, p. 90)

96. Processors of COJ for the retail market do not consider the home delivered price of COJ in setting their price. (CX 1650, p. 37; Munkelt 760; Lang 1063; Donovan 1322; Miller 1494; Mirapaul 1581)

97. Home delivery of COJ has been on the decline because of rising costs and today has almost disappeared from the market place. (CX 527J; CX 593, p. 90; Goldman 974; Lang 1063; Donovan 1320–22, 1334; Mirapaul 1581; Davis 3180–82; Parker 4387–88; Koch 4935; Piskac 5170; Brick 5316)

h. The Retail COJ Market Does Not Include Drinks and Other Juices

98. Fruit drinks and other fruit juices do not compete with COJ. (CX 301H; CX 520, pp. 56–57, 65–66, 95; CX 1196; Munkelt 758; Goldman 966; Lang 1063; Miller 1495; Mirapaul 1573; Bock 1658–59; Hoffer 1920; CX 593, pp. 392–93)

99. Producers of COJ do not take the prices of fruit drinks or other fruit juices into consideration in their pricing or marketing of COJ. (CX 667C, H; CX 1650, p. 38; Goldman 966; Lang 1063; Mirapaul 1573) One reason that grapefruit juice prices are not considered in pricing COJ is the different raw material cost for the two juices. (CX 1650, p. 38) Orange drink producers do not consider the price of COJ in pricing their drinks. (CX 520, pp. 56–57; CX 661E; CX 667H) Tropicana compares the price of Tropicana grapefruit juice only to that of other brands of grapefruit juice and the price of Tropicana [21] drink only to those of other drinks. (CX 675B; CX 688A; CX 689C; CX 730C; CX 748B; CX 750H; CX 7902F; CX 915A; CX 951B; CX 1126B; CX 1162A; CX 1177B)

E. *Geographic Market*

100. There virtually are no imports of COJ into the United States. (CX 527E, no. 19)

101. The three largest sellers of COJ to retail grocery stores, Tropicana, Minute Maid and Kraft, together sell COJ throughout all or almost all areas of the United States. (CX 46U, V-Z, Z–6, Z–7; CX 345T-V; CX 354A; CX 388, tables 4 & 5; CX 526A-S; CX 527Z–7, no. 182; CX 560, Z–88, Z–99, Z–109, Z–114, Z–119, Z–121, Z–123, Z–125, Z–130, Z–135, Z–140, Z–142, Z–144, Z–149, Z–151, Z–156, Z–161; Munkelt 718, 760, 763–64; Miller 1482, 1492; Barnebey 4021, 4033)

102. The brands of the three largest sellers of COJ sold in grocery stores are recognized by industry officials as "national brands" with differences in market penetration in parts of the country. (CX 354A;

CX 1650, p. 69–70; Munkelt 760; Lang 1058, 1141; Miller 1490–91; Mirapaul 1575; Barnebey 4069)

103. Industry officials examine and report on the national sale of COJ through grocery stores. (CX 13A-J; CX 38F; CX 39B; CX 386, p. 101; CX 394, pp. 38–40; CX 396M; CX 400A-U; CX 401A-K; CX 402A-K; CX 403A-K; CX 404A-K; CX 405A-K; CX 406A-K; CX 407A-S; Munkelt 749, 785–86) Minute Maid uses national Nielsen data on the retail COJ market in presentations to its customers and prospective customers. (Munkelt 749) Tropicana marketing documents characterize the movement of COJ through grocery stores in the United States as "Ready to Serve Orange Juice Sales Glass, Cartons and Plastic - Total U.S." (CX 13B; CX 394, p. 25; CX 560 p. 11)

104. Tropicana tries to sell its COJ throughout the United States. (Barnebey 4040) It has an internal sales organization and broker system which covers all of the United States. (CX 527Z–9, no. 188; CX 527Z–35, no. 302; Barnebey 4022–23, 4038; CX 1654) In 1977 Tropicana had 57 brokers working in 36 states and Washington, D.C. (CX 375)

105. Tropicana has a single f.o.b. Bradenton price—plus freight—for its COJ sold in truckloads to all types of customers throughout the United States. (Barnebey 4068) Tropicana also sells COJ in less than truckload amounts on a delivered price basis in several pricing zones. (Barnebey 4067, 4069–4070; Jessup 2791)

106. Most promotional and advertising programs at [22] Tropicana are centrally planned by its marketing staff at Bradenton. (CX 1650, p. 70–71; Jessup 2784, 3076–77) All pricing decisions at Tropicana are made in Bradenton, Florida. (CX 593, p. 26; Jessup 3054)

107. Tropicana and Minute Maid sometimes advertise their COJ nationally, using media which serve the entire country. (CX 38E; CX 39, p. 6; CX 916E; CX 936A-C; CX 1250C-D, J-K; CX 1650, pp. 71–73; Munkelt 791; Barnebey 4069)

108. Some chain grocery stores use national buyers for COJ. (CX 1339C; CX 1650, pp. 57–58) Such buyers are called "national accounts" by Tropicana. (CX 1650, pp. 57–58) Among firms considered to be national accounts by Tropicana are Safeway, Kroger, A&P, Winn-Dixie and Topco Associates. (Barnebey 4041–42)

109. Tropicana has a national accounts sales manager who calls on chain store accounts. (Barnebey 4041–42)

110. Tropicana sells COJ from its plant in Bradenton, Florida which ships to every state except Alaska and Hawaii. (CX 378A-E) Tropicana has been shipping COJ to California, Washington and Oregon since the early 1960's and has served the mountain states from Florida for more than five years. (CX 1650, pp. 61–62; Barnebey 4026)

111. Minute Maid sells COJ to grocery stores throughout the coun-

try, all of which is reconstituted at seven facilities including four milk plants, from bulk FCOJ shipped from Florida. (Munkelt 718, 721, 724)

112. Kraft processes its COJ for sale throughout the country to grocery stores under the Kraft brand at a plant in Florida and through a west coast co-packing arrangement. (CX 1650, p. 74; Miller 1482) The Florida plant primarily serves all areas of the United States except the west coast and Hawaii, but has shipped COJ to California; the west coast and Hawaii generally are served by the co-packing arrangement. (CX 1355A; CX 1650, p. 74; Miller 1483) Approximately 90% of Kraft brand COJ is packed in Florida and shipped to the warehouses of corporate foodchains. (Miller 1508–09)

113. Hood Dairy Company primarily sells COJ in New England and to grocery stores in Buffalo, Chicago, and parts of the southeastern United States. It sells in ten states. (CX 345T-U; CX 388 tables 4 & 5; CX 389 tables 4 & 5; CX 505C; CX 506C; CX 1650, p. 145; Munkelt 764–65; Donovan 1296)

114. Almost all COJ sold throughout the United States is made from orange juice or frozen concentrate from Florida. (CX 22F; CX 40D; CX 41B; CX 42C; CX 527D, no. 18; CX 1650, p. 12; Munkelt 723, 835; Goldman 961, 1001, 1032; Lang 1101; Miller [23] 1539; Mirapaul 1569; Barnebey 3950, 3990, 3999, 4001) At times of short supply, however, processors have relied on imports. (Barnebey 4001) California oranges are used for blending purposes or when the Florida supply is disrupted. (Munkelt 723; Goldman 1043–44; Barnebey 3950–51) COJ made entirely from concentrate of California or Arizona oranges has a low sugar content and is sour. (Munkelt 723; Goldman 1044; Bock 1665; Barnebey 3930, 3950) Texas oranges are too sweet for COJ. (Goldman 1044) California and Texas oranges have a low juice content, thereby making their use for COJ processing very expensive. (Barnebey 3950–51)

115. In 1977 Beatrice processed COJ was sold to grocery stores in 23 states (CX 46E-Z–4):

Alabama
California
Colorado
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Montana
Nebraska
Nevada
New Mexico
Ohio
Oklahoma
Oregon
South Dakota
Utah
Wyoming

116. Beatrice has dairy distribution facilities in Detroit; Baltimore; Alexandria, Virginia; New York; Los Angeles; Nashville; Fort Worth; and Pittsburgh which could be used for the distribution of COJ. (CX 526V-W)

117. In 1977 Beatrice and Tropicana directly competed in the sale of COJ to the retail market on all or part of twenty-one states. (*Compare* CX 46 with CX 526I-M and Z1–25)

F. *Market Structure*

a. Market Shares

118. In 1975 gallon sales of COJ at retail through grocery stores totalled 132.5 million gallons (CX 560Z–17) The retail dollar sales of COJ in that year totalled $250,000,000. (CX 560Z–24)

119. In 1976 the gallon sales of COJ at retail through grocery stores totalled 160.9 million gallons. (CX 423L; CX 560Z–17) The total retail dollar sales of COJ in that year totalled $310,200,000. (CX 423L; CX 560Z–24) [24]

120. In 1977 gallon sales of COJ at retail through grocery stores totalled 188.9 million gallons. (CX 426F; CX 560Z–17) The retail dollar sales of COJ in that year totalled $411,500,000. (CX 560Z–24)

121. In 1978 the gallon sales of COJ at retail through grocery stores totalled 204.1 million gallons. (CX 560Z–17) The retail dollar sales of COJ in that year totalled $545,200,000. (CX 560Z–24)

122. In 1975 the leading brands of COJ sold in grocery stores had the following market shares (CX 560Z–18):

Brand	Market Share (in gallons)	Market Share (in dollars)
Tropicana	28.9	30.3
Kraft	13.8	15.0
Minute Maid	7.3	6.7
Hood	5.8	5.0
	55.8%	57.0%

123. In 1978, the four leading brands of COJ sold in grocery stores had the following market share (CX 560Z–18; Z–25):

Brand	Market Share (in gallons)	Market Share (in dollars)
Tropicana	29.9	30.6
Kraft	10.4	11.5
Minute Maid	15.5	15.4
Hood	4.4	4.0
	60.2	61.5%

124. In 1978, private label gallon sales of COJ in retail groceries totalled 18.7% of the market in gallons and 17.4% in dollars. In 1975 this share of the market was about the same. (CX 560Z–18)

125. Sales of COJ to grocery stores has increased from 132.5 million gallons in 1975 to 204.1 million gallons in 1978. (CX 560Z–17) Tropicana's share of the market has been about the same during that time. (CX 560Z–18) Industry FCOJ sales volume has remained stable. (Hoffer 1928–1930)

126. In the 1977–78 growing season 256.3 million gallons of COJ were processed in the United States from Florida oranges. (CX 594J, pp. 24–25; CX 594K, pp. 14A, 1C) Of that amount, 134.4 million gallons of COJ were produced directly from fresh oranges while 121.9 million gallons of COJ were reconstituted. (CX 594J, pp. 24–25; CX 594K, pp. 14A, 1C) [25]

127. Almost all of the COJ processed in the United States comes from Florida oranges. (CX 1650, p. 12) In the 1977–78 season, Tropicana processed about 40% (109.6 million gallons). (CX 594J, p. 15–16, 19; CX 594I) Tropicana, Minute Maid, Kraft and Hood together processed in Florida more than 171.4 million gallons of COJ, more than 60% of the total processed in the United States. (CX 594J, p. 15–16, 19, 22–23; CX 594I)

128. In 1976 and 1977, Tropicana shipped 55% of the COJ processed in Florida. (CX 527E; CX 527R; CX 1650, p. 24; Barnebey 3993, 3999)

129. Minute Maid division of the Coca-Cola Company started processing COJ and selling it to grocery stores in 1971, and in 1979 had nationwide distribution. (CX 298; CX 593, p. 253; Munkelt 718, 761)

130. Some small processors of COJ have gone bankrupt in recent years, including Orange Blossom, Glacier Grove and Polar-Vim. (CX 527Z–11; CX 527Z–44; CX 680H; CX 1094C; Goldman 1032, 1035–36; Davis 3164)

b. Barriers to Entry

131. Ex-Cell-O Corporation makes carton-making machinery and has about 50% of the market. These machines make gable-topped paper milk or juice cartons. (Brick 5287–93) A small 30 quart per minute Ex-Cell-O machine can be leased for $150 per month. (Brick 5325) A half-pint packaging machine can be purchased for about $120,000. (Polidoro 5375)

132. A glass packaging line for COJ costs $250,000 to $600,000. (CX 1650, p. 96) The cost of a carton packaging line (case packers, box makers and pasturization equipment used with the Ex-Cell-O machine) is about $250,000. (Barnebey 4046–47) Separate packaging lines and Ex-Cell-O machines are required for quarts, half-gallons and gallons, and each size carton. (Brick 5325–26) Refrigerated warehouse space must be built or leased. (CX 527Z–56)

133. Blow molding is a process whereby polyethylene or polystyrene is melted and formed into a container by blowing air into the thin wall

of the plastic. (Donovan 1295) It may be used in packaging of milk and COJ (CX 1081B; CX 1084B; RX 17H; RX 18D; Donovan 1285, 1295–96) Equipment to produce blow molded plastic gallon containers costs about $500,000 to $750,000. (Munkelt 826; Donovan 1329; Dutt 3833)

134. Several hundred dairies in the United States process COJ. (Brick 5294; finding 261) **[26]**

135. Entry into the processing of COJ by dairies is usually quick and inexpensive. The plant manager simply orders frozen concentrate. The dairy already has all the necessary equipment and method of distribution. (Parker 4312–13; Koch 4873–74; Piskac 5167; Goldman 1022–23)

136. To obtain shelf space in a grocery store, national brands of COJ spend millions of dollars on advertising and promotion. (CX 572Z–4; Koch 4955–56; CX 345N) In 1974, Tropicana spent $4.2 million on advertising and promotion. (CX 527Z–4)

137. Grocery stores will stock nationally advertised COJ, even at a higher price than unadvertised brands, because of consumer acceptance of the advertised brand. (Koch 4955–56; CX 661F)

138. Regional and local processors sometimes advertise their brand of COJ in newspapers and on local radio and television, as well as billboards, and in-store promotions. (CX 660B; CX 662C-D; CX 778–784)

139. Regional and local processors and private labels use lower prices and promotional allowances to sell their COJ. (Goldman 964, 1010–1111; Mirapaul 1576; Lang 1133–34; CX 883A)

140. A typical grocery store handles about five brands of COJ including two national brands and sometimes a private label. (CX 764B; CX 769A; CX 1147B; CX 1650, p. 124; Lang 1058; Mirapaul 1575; Jessup 2981–82)

141. There are forty plants in Florida supplying bulk frozen orange juice concentrate. (Barnebey 3899–3900) Oranges, the raw material for COJ, are in limited supply, however, and new entrants have sometimes had difficulty obtaining an assured supply of quality frozen concentrate. (Mirapaul 1582; Bock 1657, 1682; Dutt 3779–80)

142. It takes five to seven years from the time an orange tree is planted until oranges can be harvested. (Tilley 2365)

143. In recent years the number of producing orange trees has declined slightly, but with newly planted, disease resistant trees and better production methods future supply should continue to increase. (CX 22G-H)

144. A freeze in January 1977 caused a reduction in the number of Florida oranges available for orange juice production. (CX 22G) **[27]**

G. *Beatrice and Tropicana Before the Merger*

a. Tropicana

145. Tropicana principally sells COJ to grocery chain store warehouses and wholesale grocery warehouses. (Barnebey 3886) Tropicana also sells COJ to dairies (CX 41B)

146. About 7% or 8% of Tropicana's COJ business is private label packed for Safeway, Kroger, Pet, Food Fair, Topco and A&P. (Jessup 2761; Barnebey 3972, 4041)

147. About 82% of Tropicana's COJ business is in the states bordering the Atlantic Ocean and Gulf of Mexico, plus Cleveland, Detroit, Chicago, Los Angeles and San Francisco. (Barnebey 3891–92)

148. In 1977 Tropicana's brands of COJ were offered to consumers through grocery stores in 242 of the 282 standard metropolitan statistical areas (SMSAs) determined by the Bureau of the Census. (CX 47; CX 526I)

149. In 1977, national COJ sales through food stores, in millions of gallons, were as follows (CX 13H):

	Gallons	Per Cent
Tropicana	8.93	29
glass	2.82	9.2
carton	6.11	19.9
Kraft	3.43	11.2
Minute Maid	4.19	13.6
Hood	1.21	3.9
Private label	5.87	19.1[8]
All other glass	2.07	6.7
All other cartons	2.58	8.4
All other plastic	2.46	8
Total market	30.74	99.9

150. In the mid 1950's, Tropicana's principal customers were dairies. By the mid 1960's the principal customers were warehouses of chain grocery stores and grocery [28] wholesalers. (Barnebey 3887)

151. In the mid 1960's only Tropicana and Kraft were selling COJ in glass. (Barnebey 3888)

152. Now, in addition to Tropicana and Kraft, COJ is packed in glass by other Florida processors: Citrus World, Adams Packing, Southern Fruit, Tree Sweet, Sealsweet and Ben Hill Griffin. (Barnebey 3889)

153. Tropicana is the price leader in the sale of COJ. Other COJ processers examine the prices of the Tropicana COJ in determining the price at which they will sell their COJ. (Argeros CX 593, p. 423; Goldman 964, 1029; Lang 1059; Donovan 1314) Tropicana makes its

[8] About 700,000 gallons of the private label total were processed by Tropicana. (Barnebey 3972) This is more than 2% of the market.

own pricing decisions on COJ based on its costs rather than on the prices charged by its competitors. (Barnebey CX 1650, pp. 35–37, 41)

154. In 1977 Tropicana sold COJ in paper cartons, and glass bottles of various sizes, and some plastic individual serving containers. (CX 39, pp. 4–7; CX 334B-C)

155. Tropicana processes COJ at its plant in Bradenton, Florida and ships it by train to its warehouses in Kearney, New Jersey and Hammond, Indiana. (CX 382I) Tropicana also leases warehouses in Los Angeles, Seattle, Portland and Salt Lake City which it supplies by truck. (CX 527Z–25)

156. In 1977, Tropicana COJ was sold through grocery stores in all of the states of the United States except Hawaii, and Alaska. (CX 378A-E)

157. Tropicana owns 200 refrigerated rail cars. Every five days a unit train of at least 60 Tropicana rail cars, over one mile long, leaves the Bradenton Tropicana plant nonstop to the Kearney warehouse. Tropicana owns about 800 vehicles for transporting oranges and orange juice. (CX 39, p. 14)

b. Beatrice

158. In 1977 Beatrice's dairy division processed, distributed and sold three labels of reconstituted COJ. (CX 57A-Z–22; CX 58A-Z–22; CX 59A-Z–22) These brands included "Meadow Gold," the dairy division's primary brand name; "Sanitary Dairy" brand of COJ marketed by the Minden, Louisiana plant (CX 47Z–68; CX 521, p. 9; CX 528Z–18; Lang 1057); and "Dixie Sunshine," a brand of COJ which was being test marketed by Beatrice just prior to the acquisition of Tropicana. (CX 47A-Z–204; CX 528)

159. In 1977 Beatrice dairy plants bought and resold prepackaged COJ from processors such as Tropicana, Home Juice, [29] Early Bird and Minute Maid. (CX 47)

In the fiscal year ending February 28, 1978, Beatrice sold COJ through the following 37 fluid plants:

160. The Beatrice milk plant in Beckley, West Virginia sold 45,100 gallons of COJ for $126,000, processed by Tropicana and sold under the Tropicana label to the following types of customers: institutions, 35%; independent groceries, 38%; individual units of chain stores, 27%. (CX 47F)

161. The Beatrice milk plant in Billings, Montana sold 10,504 gallons of COJ for $24,478. About half of the total was purchased from Early Bird Juice Co. of Spokane, Washington and resold under the Early Bird label. The other half was purchased from another reconstituting Beatrice plant and was resold under the Meadow Gold label.

Sales of all this juice were 20% to institutions, 50% to independent groceries, and 30% to individual units of chainstores. (CX 47Z-Z; CX 47Z–157; CX 57–O)

162. The Beatrice milk plant in Boise, Idaho sold 52,700 gallons of COJ for $107,100. Of this total, 93% for 49,200 gallons and $99,600 was juice reconstituted at the plant, and 7% for 3,500 gallons and $7,500 was purchased in packaged form and resold by the plant. All of the reconstituted juice was sold under the Meadow Gold label. The resold juice was sold under the Early Bird label, processed by Early Bird, Spokane. The reconstituted juice was sold to the following types of customers: (a) independent groceries, 25%; (b) individual chainstore units, 75%. The resold juice was sold to the following types of customers: (a) independent groceries, 85%; (b) individual chainstore units, 15%. (CX 47Z–3)

163. The Beatrice milk plant in Champaign, Illinois had sales of 79,258 gallons of COJ for $167,837. None of this juice was reconstituted at the plant and all was purchased in packaged form and resold by the plant. Eighty percent of the packaged juice was sold under the Vita-Fresh brand name, processed by Central States Processing, and 20% was sold under the brand name of Meadow Gold, processed by the Beatrice dairy plant in Mattoon, Illinois. Institutions purchased 30% of the packaged juice, home delivery customers purchased 50%, independent groceries purchased 7%, and chain stores or individual units thereof, purchased 13%. (CX 47Z–6)

164. The Beatrice milk plant in Clarksburg, West Virginia sold 29,549 gallons of COJ for $88,909. No juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant. All resold juice was sold under [30] the Tropicana label, processed by Tropicana. This resold juice was sold to the following types of customers: (a) institutions, 45% for 13,297 gallons and $40,009; (b) home delivery, 5% for 1,477 gallons and $4,445; (c) independent groceries, 50% for 14,775 gallons and $44,455. (CX 47Z–11)

165. The Beatrice milk plant in Dayton, Ohio sold 81,170 gallons of COJ for $169,759. Sixteen percent was reconstituted, 84% was purchased in package form and re-sold. The reconstituted juice has been sold under the Meadow Gold label and the plant has been reconstituting juice in the years 1977 and 1978. Reconstituted juice customers were 10% for institutions, 80% for independent groceries and 10% for other restaurants and cocktail lounges. The packaged juice in 1978 was Tropicana with approximately 5% going to institutions, 80% to independent groceries, 2.5% to chain stores' individual units and 10% to restaurants and cocktail lounges. (CX 47Z–33)

166. The Beatrice milk plant in Denver, Colorado sold COJ under the Meadow Gold label obtained from Beatrice's Greeley, Colorado

plant. For 1978, this plant sold 112,812 gallons of COJ for $245,562. Its customer mix is 14% institutional, 16% home delivery, 50% independent groceries, and 20% individual units of chainstores. (CX 47Z–35)

167. The Beatrice milk plant in Durham, North Carolina did not reconstitute any orange juice. All was purchased and resold. Except for approximately 2% of 1978 purchases, all COJ purchased and resold was Tropicana. The 2% was purchased from Biltmore. COJ sales were 10,465 gallons at $25,061. The customer types were: institutions (20%); home delivery (10%); independent groceries (50%); IGA and co-op stores (20%). (CX 47Z–38)

168. The Beatrice milk plant in Eugene, Oregon sold 8,644 gallons of COJ for $16,800, purchased for resale from Dairy Gold of Eugene and sold under the Meadow Gold label. All sales were to independent groceries. (CX 47Z–40)

169. The Beatrice milk plant in Fort Wayne, Indiana never reconstituted orange juice. The re-sold juice which it carries, has been supplied by Benhill-Griffin or its predecessor, Dunlop, under that label. Approximately 5% of its orange juice sales have come from Tropicana, and have been sold under that label. In 1978, the plant sold 18,602 gallons of COJ for $44,620. The customer mix for this plant was: home delivery (35%), independent groceries (30%), and grocery wholesalers (35%). (CX 47Z–41)

170. The Beatrice milk plant in Gadsden, Alabama sold 115,691 gallons of COJ for $225,601. Of this, 87,394 gallons at $207,496 was reconstituted at the plant under the Meadow Gold label. The remainder of 28,297 gallons at $48,105 was Tropicana [31] that was purchased and resold. The customer type was the same for reconstituted and resold: institutional—25%; home delivery—15%; and independent groceries—60%. (CX 47Z–43)

171. The Beatrice milk plant in Grand Island, Nebraska has not reconstituted any COJ. All COJ is obtained from the Beatrice Lincoln plant. The sales volume was: 5,196 gallons at $10,810. In 1978, 30% of COJ sales was to institutions, 40% to home delivery and 30% to independent groceries. (CX 47Z–45)

172. The Beatrice milk plant in Grand Junction, Colorado sold 54,402 gallons of COJ for $128,800. Seventy percent was of Minute Maid and 30% of Meadow Gold obtained by intercompany transfer from Meadow Gold, Greeley, Colorado. Sales for these years were broken down into 20% to independent stores, 20% to distributors, and 60% to individual units of chain stores. (CX 47Z–46)

173. The Beatrice milk plant in Great Falls, Montana sold the following amounts of COJ: 16,134 gallons for $36,908. The plant has never reconstituted juice and has obtained its entire supply for resale

from Early Bird of Spokane, Washington. Sales were broken down to 30% institutional, 60% to individual units of chainstores, 5% to home delivery, and 5% to independent groceries. (CX 47Z–47)

174. The Beatrice milk plant in Greeley, Colorado sold 91,396 gallons of COJ of which 74,284 gallons for $142,334 was reconstituted and sold under the Meadow Gold label. The plant resold 17,112 gallons of COJ in 1978 for $39,621, 75% under the Oak Farm label and 25% under the Minute Maid label. Reconstituted juice was sold 60% to institutional, 20% to independent stores, and 20% to chainstores or individual units thereof. The plant also reconstituted COJ and sold large amounts on intercompany transfer to plants at Colorado Springs, Denver, Grand Junction, Topeka and elsewhere. (CX 47Z–48; CX 47Z–174; CX 57Z–7; CX 57Z–8; CX 57R; CX 57I; CX 521, p. 11)

175. The Beatrice plant in Honolulu, Hawaii has sold nothing but reconstituted COJ marketed under the Meadow Gold label. Twenty-five percent of the COJ has gone to independent groceries with the remainder going to individual units of chain stores. Sales in 1978 were 43,538 gallons of COJ for $127,317. (CX 47Z–50)

176. The Beatrice milk plant in Huntsville, Alabama sold 237,341 gallons of pure juice of all types, representing $586,284 in sales, of which approximately 90% was COJ. None of the juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant. Eight-three percent was purchased from Tropicana and sold under the Grove Queen label and 17% was purchased from Cal-Tex and sold under the Vita Fresh label. Six percent of the juice was sold to institutions, [32] 19% to home delivery customers, 67% to independent groceries, 8% to chain stores or individual units thereof. (CX 47Z–51)

177. The Beatrice milk plant in Lima, Ohio sold 48,313 gallons of COJ for $114,501 all of which was purchased for resale. A total of 6,000 gallons was purchased from Ohio Pure Juice of Columbus, Ohio and sold under the Ohio Pure Juice label. The remainder was bought from Tropicana and sold under its label. This resold juice was sold to the following types of customers: institutional, 15%; home delivery, 5%; independent groceries, 75%; individual units of chain stores, 5%. (CX 47Z–57)

178. The Beatrice milk plant in Lincoln, Nebraska sold 40,800 gallons of COJ for $74,600, reconstituted at the plant and sold under the Meadow Gold label. This reconstituted juice was sold to the following types of customers: (a) institutions, 60%; (b) home delivery, 25%; (c) independent groceries, 10%; and (d) individual units of chain stores, 5%. (CX 47Z–59)

179. The Beatrice milk plants in Louisville, Kentucky sold 56,731 gallons of COJ for $116,708, 42,799 gallons at $74,132 of reconstituted

and 13,932 gallons at $42,574 of resold. The reconstituted was all Meadow Gold label. The resold was 90% Home Juice and 10% Tropicana. In 1978, sales of COJ were 2% institutional, 25% home delivery, and 73% to independent groceries, restaurants and the like. (CX 47Z–62)

180. The Beatrice milk plant in Mattoon, Illinois sold 68,880 gallons of COJ for $75,641, reconstituted at the plant, and sold under the Meadow Gold label to independent groceries. (CX 47Z–64)

181. The Beatrice milk plant in Missoula, Montana has not reconstituted COJ. All was purchased and resold. In 1978, 32,610 gallons were sold for $84,485. Of this, 65% was packaged under the Meadow Gold label by the Early Bird Juice Co. of Spokane, Washington. The remainder was also purchased from the Early Bird Juice Co. but sold under the Early Bird label. The customer types in 1978 were: institutions (5%), home delivery (5%), independent groceries (70%), and individual units of chain stores (20%). (CX 47Z–69)

182. The Beatrice milk plant in Muncie, Indiana sold 24,032 gallons of COJ for $43,680. Five hundred gallons were purchased from Orchard Grove and sold under its label, with the rest being purchased from Ben Hill Griffin of Plymouth, Indiana for sale under its label. Eighty percent of sales were to independent groceries, 20% to institutional customers. (CX 47Z–70)

183. The Beatrice milk plant in New Bremen, Ohio sold 25,546 gallons of COJ for $58,099, all purchased in package form [33] and resold by the plant, under the Everfresh brand name, processed by Home Juice Company. Five percent of the COJ was sold to institutional customers, 75% to home delivery customers, 15% to independent groceries, 5% to chain store individual units. (CX 47Z–71)

184. The Beatrice milk plant in Opelika, Alabama sold 115,692 gallons of COJ for $309,570 purchased in packaged form and resold under the following labels: Vita Fresh, processed by Cal-Tex Citrus, 60% (for 69,415 gallons and $185,742); Tropicana, processed by Tropicana, 40% (for 46,277 gallons and $123,825). This resold juice was sold to the following types of customers; (a) institutions, 25%; (b) home delivery, 25%; (c) independent groceries, 30%; and (d) individual units of chain stores, 20%. (CX 47Z–76)

185. The Beatrice milk plant in Orange City, Florida resold 277,011 gallons of COJ for $506,653 and packaged 138,505 gallons for $253,324 of COJ. The packaged juice was sold under the Meadow Gold label and obtained from Ardmore Farms. The resold juice was purchased from Tropicana and sold under the Tropicana label. Of the packaged juice, 10% was sold to institutional customers, 60% to independent groceries, and 30% to individual units of chain stores. The resold juice was

sold to independent groceries for 65% of sales with 35% to individual units of chain stores. (CX 47Z–93)

186. The Beatrice milk plant in Ottumwa, Iowa sold 18,410 gallons of COJ for $43,020. All was purchased in packaged form and resold by the plant under the Vita-Fresh label, processed by Central States Processing, Columbia, Mo. This resold juice was sold to the following types of customers: institutions, 5%, home delivery, 15%; independent groceries, 57%; individual units of chain stores, 23%. (CX 47Z–95)

187. The Beatrice milk plant in Radford, Virginia sold 85,713 gallons of COJ for $225,381 all purchased in package form and resold by the plant. The COJ was purchased in package form from Biltmore Dairy Farms for $23,311 and sold under the Meadow Gold brand name, or from Tropicana and sold under the Tropicana brand name. The Radford plant purchased $159,086 of Tropicana brand orange juice. Ten percent of the COJ sold to institutional customers, 20% to home delivery customers, 60% to independent grocery stores and 10% to chain store independent units. (CX 47Z–108)

188. The Beatrice milk plant in Reno, Nevada sold 20,334 gallons of COJ for $35,966; 13,000 gallons, representing $19,000 in sales, were reconstituted at the plant, and 7,334 gallons for $16,966 was purchased in packaged form and resold by the plant. All of the COJ was sold under the Meadow Gold brand name. The pre-packaged juice was purchased from Edward's Marketing Company. Fifteen percent was sold to institutional [34] customers, 5% sold to home delivery customers, 10% to independent groceries, 70% to chain store individual units. (CX 47Z–113)

189. The Beatrice milk plant in St. Joseph does not reconstitute single strength orange juice. All COJ is purchased and resold. Ninety-five percent of this is obtained from Tropicana and 5% is Vita-Fresh from Central States. In 1978, orange juice sales were 7,591 gallons at $18,020. The customer types were: institutions (5%), home delivery (10–15%), independent groceries (70–80%) and individual units of chain stores (5%). (CX 47Z–117)

190. The Beatrice milk plant in Salt Lake City, Utah sold 109,000 gallons of COJ for $297,600, purchased in packaged form and resold by the plant under the Meadow Gold label, processed by Edwards Marketing. This resold juice was sold to the following types of customers: (a) institutions, 1%; (b) independent groceries, 60%; (c) individual units of chain stores, 39%. (CX 47Z–119)

191. The Beatrice milk plant in San Jose, California sold 128,713 gallons of COJ for $266,709. No juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant under the Meadow Gold label, processed by Edwards Marketing. This resold

juice was sold to the following types of customers; (a) institutions, 15%; (b) home delivery, 5%; (c) independent groceries, 20%; and (d) individual chain store units, 60%. (CX 47Z–122; CX 57Q).

192. The Beatrice milk plant in Topeka, Kansas did not reconstitute COJ. In 1978, all COJ was Meadow gold obtained by intercompany transfer from Greeley, Colorado. Sales for the plant are as follows: 1978, 8,203 gallons and $22,501. (CX 47Z–133)

193. The Beatrice milk plant in Tulsa, Oklahoma sold 170,412 gallons of COJ for $344,776, 50,049 gallons of which was reconstituted at the Tulsa plant and sold for $95,052. All of the juice reconstituted at the plant was sold under the Meadow Gold label. The juice which was purchased and resold by the plant was sold 90% under the Mr. Pure label, processed by the Home Juice Company, and 10% of the juice which was purchased and resold was sold under the Everfresh label, also processed at the Home Juice Company. Ninety percent of the reconstituted juice was sold to home delivery customers, 5% of the reconstituted juice was sold to independent grocery stores and 5% was sold to chain store units. Of the juice which was purchased and resold, 30% was sold to institutional customers, 15% to home delivery customers, 30% to independent groceries, and 25% to chain store units. (CX 47Z–134)

194. The Beatrice milk plant in Tuscaloosa, Alabama [35] sold 27,299 gallons of juice for $72,222, of which 95% was COJ. All was purchased in packaged form and resold by the plant. The resold juice was sold under the following labels: Vita-Fresh, processed by Vita-Fresh, 20%; and Tropicana, processed by Tropicana, 80%. This resold juice was sold to the following types of customers: (a) institutions, 20%; (b) home delivery, 20%; (c) independent groceries, 30%; and (d) individual chain store units, 30%. (CX 47Z–138)

195. The Beatrice milk plant in Westerville does not reconstitute juice. All orange juice that is distributed is purchased from outside sources. In 1978, total COJ were 81,015 gallons at $139,047. Of this, 75% was Meadow Gold obtained from the Louisville plant; 15% was Tropicana and 10% was Vita-Fresh. Five percent of sales were to institutions, 85% to home delivery, 5% to independent groceries and 5% to individual units of chain stores. (CX 47Z–147)

196. The Beatrice milk plant in Zanesville, Ohio sold 20,402 gallons of COJ at $40,931. Of this, 16,591 gallons at $27,948 was reconstituted under the Meadow Gold label. The remainder (3,811 gallons at $12,983) was purchased and resold Tropicana. For the reconstituted sales, the customer types were as follows: institutions (10%); home delivery (10%); independent groceries (80%). The customer type for the resold juice was: 97% home delivery and 3% independent groceries. (CX 47Z–150)

For the fiscal year ending February 28, 1978, Beatrice sold COJ through the following six additional plants which were not milk producers:

197. The Beatrice dairy plant in Colorado Springs, Colorado sold 58,035 gallons of COJ for $130,716, all purchased in packaged form and sold under the Meadow Gold label, processed by Meadow Gold, Greeley, Colorado. This resold juice was sold to the following types of customers: (a) institutions, 15%; (b) home delivery, 40%; (c) independent groceries, 20%; (d) individual chain store units, 25%. (CX 47Z–22)

198. The Beatrice dairy plant in Dothan, Alabama has not reconstituted any orange juice. Sales in 1978 were 28,266 gallons of COJ at $65,229. Of this, 70% was Vita-Fresh obtained from Meadow Gold, Opelika; 20% was Meadow Gold obtained from Orange City; 10% was Tropicana obtained from Orange City. Five percent of sales was to institutions and 95% was to independent groceries. (CX 47Z–36)

199. The Beatrice dairy plant in Meinerz, Louisiana had sales of $306,118, purchased by Meinerz Creamery in packaged form from Ben Hill Griffin and sold under the Sun-Blossom brand [36] label. All single strength orange juice was sold to other dairy companies. (CX 47Z–66)

200. The Beatrice dairy plant in Minden, Louisiana sold 169,753 gallons of COJ for $288,688, all of which was reconstituted at the plant. This reconstituted juice was sold under the Sanitary Dairy label. The juice was sold to the following types of customers: institutional, 5%; home delivery, 15%; independent groceries, 40%; individual units of chain stores, 40%. (CX 47Z–68)

201. The Beatrice dairy plant in Pocatello, Idaho sold 24,329 gallons of COJ for $56,574 purchased in packaged form and resold by the plant. The resold juice was sold under the Meadow Gold label, processed by Meadow Gold, Boise, Idaho. This resold juice was sold to the following types of customers: independent groceries, 50%; individual units of chain stores, 50%. (CX 47Z–106)

202. The Beatrice dairy plant in Wichita, Kansas sold 5,453 gallons of COJ for $14,722, all of which was purchased for resale from Vita-Fresh Company of Columbia, Missouri and sold under the Vita-Fresh label. Eighty percent of sales were to home delivery and 20% to independent groceries. (CX 47Z–149)

203. In 1977 Beatrice had the following 37 milk plants in the United States (CX 47; CX 241–243):

Beckley, WV	(CX 47F)
Billings, MT	(CX 47Z–2)
Boise, ID	(CX 47Z–3)
Champaign, IL	(CX 47Z–6)

Clarksburg, WV	(CX 47Z–11)
Dayton, OH	(CX 47Z–33)
Denver (Oxford-Englewood), CO	(CX 47Z–35)
Durham, NC	(CX 47Z–38)
Eugene, OR	(CX 47Z–40)
Fort Wayne, IN	(CX 47Z–41)
Gadsden, AL	(CX 47Z–43)
Grand Island, NE	(CX 47Z–45)
Grand Junction, CO	(CX 47Z–46)
Great Falls, MT	(CX 47Z–47)
Greeley, CO	(CX 47Z–48)
Honolulu, HI	(CX 47Z–50)
Huntsville, AL	(CX 47Z–51)
Lima, OH	(CX 47Z–57)
Lincoln, NE	(CX 47Z–59)
Louisville, KY	(CX 47Z–62)
Mattoon, IL	(CX 47Z–64)
Missoula, MT	(CX 47Z–69)
Muncie, IN	(CX 47Z–70)
New Bremen, OH	(CX 47Z–711)
Opelika, AL	(CX 47Z–76) **[37]**
Orange City, FL	(CX 47Z–93)
Ottumwa, IA	(CX 47Z–95)
Radford, VA	(CX 47Z–108)
Reno, NV	(CX 47Z–113)
St. Joseph, MO	(CX 47Z–117)
Salt Lake City, UT	(CX 47Z–119)
San Jose, CA	(CX 47Z–122)
Topeka, KS	(CX 47Z–133)
Tulsa, OK	(CX 47Z–134)
Tuscaloosa, AL	(CX 47Z–138)
Westerville, OH	(CX 47Z–147)
Zanesville, OH	(CX 47Z–150)

204. In 1977, Beatrice's Meadow Gold brand of COJ was sold to grocery stores in the following 18 SMSAs where Tropicana did not so sell its COJ (CX 47; CX 526I-M, Z–1–Z–5):

Anniston, Indiana
Billings, Montana
Boise City, Idaho
Eugene, Oregon
Evansville, Indiana
Fort Collins, Colorado
Greeley, Colorado
Honolulu, Hawaii
Lawton, Oklahoma
Lincoln, Nebraska
Omaha, Nebraska
Owenboro, Kentucky
Provo-Orem, Utah
Reno, Nevada
Salinas-Seaside-Monterey, California

Santa Cruz, California
Sioux City, Iowa
Springfield, Illinois

205. In 1977 Beatrice's brands of COJ were sold and delivered by Beatrice milk plants to individual stores of supermarket chain stores in the United States. (CX 528) These included stores of chains such as Safeway, Kroger, Albertson's, IGA, King Soopers, Winn-Dixie, Pantry Pride, Super Valu, Dillon, Allied, Humpty-Dumpty, Piggly-Wiggly, Star Market and Jewel and A&P. (CX 47Z–3–5, Z–22, Z–35, Z–50, Z–68, Z–69, Z–73, Z–93, Z–134, Z–195; CX 526Z–6 to Z–12; CX 526Z–6 to Z–12; Parker 4323, 4330)

206. In fiscal 1978, Beatrice dairy plants bought and resold 643,511 gallons of packaged Tropicana COJ. (CX 47)

207. Prior to its acquisition of Tropicana, Beatrice offered its brands of COJ in carton and plastic containers and had just started distributing the glass Dixie Sunshine private label. (CX 528Z–29; CX 180F) [38]

208. In the fiscal year ending February 28, 1978, the following amounts of Meadow Gold Brand COJ processed by Beatrice were sold by the following plants to grocery stores:

Plant	Gallons Sold to Grocery Stores	Dollar Sales	
Billings	4,202	$ 10,365	(CX 47Z-2; CX 57-O)
Boise	49,200	99,600	(CX 47Z-3)
Champaign	3,170	6,713	(CX 47Z-6; CX 57T)
Colorado Springs	26,116	58,822	(CX 47Z-22)
Dayton	10,389	21,729	(CX 47Z-33)
Denver	78,968	171,893	(CX 47Z-35)
Dothan	4,862	11,440	(CX 47Z-36; CX 57H)
Gadsden	52,436	124,498	(CX 47Z-43)
Grand Island	1,559	3,243	(CX 47Z-45, Z-171; CX 57X)
Grand Junction	16,321	38,640	(CX 47Z-46)
Greeley	29,714	56,933	(CX 47Z-48, Z-174; CX 57Z-9)
Honolulu	53,538	127,317	(CX 57Z-16)
Lincoln	6,120	11,192	(CX 47Z-59)
Louisville	31,243	54,116	(CX 47Z-62)
Matton	68,880	75,641	(CX 43; CX 47Z-64; CX 57D)
Pocatello	24,329	56,574	(CX 47Z-106; CX 57G)
Reno	10,400	15,200	(CX 47Z-113; CX 57Z-5)
Tulsa	27,567	52,279	(CX 47Z-134)
Westerville	6,076	10,428	(CX 47Z-147; CX 57Z-18)
Zanesville	13,273	22,358	(CX 47Z-150; CX 57Z-4)
Total	518,363	$1,028,981	

209. Grocery stores mark up dairy products 25% for resale to consumers. (Parker 4376; Clayton 6049) Hence the [39] retail shelf value of the COJ processed by Beatrice and sold through grocery stores in fiscal 1978 was $1,286,226.

210. In fiscal 1978, Beatrice processed and sold 135,802 gallons of COJ to grocery stores under the Sanitary Dairy brand name from its plant at Minden, Louisiana. The sales price of that COJ was $230,950 and it had a retail sales value of $288,688. (CX 47Z–68; CX 57S)

211. In fiscal 1978, Beatrice processed and sold to grocery stores in the United States a total of 654,165 gallons of COJ for $1,259,931. (findings 208 and 210) The retail sales value of that COJ was $1,574,-914. (findings 208–10)

212. In fiscal 1978 the following amounts of COJ not processed by Beatrice were sold to grocery stores under the Meadow Gold brand by the following Beatrice fluid milk plants:

Plant	Gallons Sold to Groceries	Dollar Sales	
Eugene	8,644	$ 16,800	(CX 47Z-40)
Missouli	19,077	49,423	(CX 47Z-69)
Orange City	124,655	227,992	(CX 47Z-93)
Radford	52,896	139,200	(CX 47Z-108; CX 57Z-12)
Reno	5,867	13,573	(CX 47Z-113)
Salt Lake	107,910	294,624	(CX 47Z-119; CX 57L)
San Jose	102,970	213,367	(CX 47Z-122; CX 57Q)
Total	422,019	$954,979	

The retail value of the Meadow Gold brand COJ sold through grocery stores in 1977 that was not processed by Beatrice was $1,193,724. (finding 209)

213. In fiscal 1978 the total amount of Beatrice Meadow Gold or Sanitary Dairy brand COJ sold to grocery stores was 1.08 million gallons with a retail value of $2.77 million. Beatrice label COJ had a market share of .57% of the retail COJ market measured in gallons or .67% measured in dollars. (findings 120, 208–12)

214. In fiscal 1978, the total amount of COJ processed by Beatrice sold to grocery stores was 654,165 gallons with a retail value of $1,574,914. (finding 211) Beatrice processed .35% of the retail COJ market measured in gallons or .38% measured in dollars. (finding 121) **[40]**

215. In fiscal 1978 the following amounts of COJ processed by Beatrice were sold by the following dairy plants:

Plant	Gallons Processed	
Billings	5,252	(CX 47Z-2; CX 57-O)
Boise	49,200	(CX 47Z-4)
Champaign	15,851	(CX 47Z-6; CX 57T)
Colorado Springs	58,035	(CX 47Z-22)
Denver	112,812	(CX 47Z-35)
Dayton	12,987	(CX 47Z-33)
Dothan	5,653	(CX 47Z-36)

Plant	Gallons Processed	
Gadsden	87,394	(CX 47Z-43)
Grand Island	5,196	(CX 47Z-45; CX 57X)
Grand Junction	16,320	(CX 47Z-46)
Greeley	74,284	(CX 348; CX 57Z-9)
Honolulu	53,538	(CX 47Z-50; CX 57Z-16)
Lincoln	40,800	(CX 47Z-59)
Louisville	42,799	(CX 47Z-62; CX 57N)
Mattoon	68,880	(CX 47Z-64; CX 57D)
Minden	169,753	(CX 47Z-68; CX 575)
Pocatello	24,329	(CX 47Z-106; CX 57G)
Reno	18,299	(CX 57Z-5)
Tulsa	50,049	(CX 57Z-3)
Topeka	8,203	(CX 47-133; CX 57I)
Westerville	60,761	(CX 47Z-147; CX 57Z-18)
Witchita	5,453	(CX 57V)
Zanesville	16,591	(CX 47Z-15D; CX 57Z-4)
Total	1,002,439 [41]	

216. Beatrice's market share in the total processing of COJ (wherever sold) in fiscal 1978 was about .39%. (findings 127, 219)

217. COJ processed by Beatrice is sold to retail grocery stores at a price low enough to allow sale to consumers at a price per serving which is 25% to 35% lower than national brands of COJ like Tropicana, Kraft and Minute Maid. Beatrice's production of COJ is primarily in cartons and blow molded plastic containers. (CX 738A; CX 739A; CX 740B; CX 753E; CX 755C; CX 770A; CX 922B; Parker 4324; Koch 4876) One gallon blow molded containers of COJ offer consumers a lower per serving cost than do half-gallon cartons of COJ. (Jessup 2900; Parker 4325–26; CX 1086C) Last year in Mattoon, Illinois, Beatrice's one gallon plastic container of COJ sold to consumers for $2.49 compared to a per gallon price for glass or carton half-gallon containers of Tropicana, Minute Maid and Kraft of $3.38 to $3.78. (Parker 4325–26)

c. Competition Between Beatrice and Tropicana

218. Beatrice dairy plants sell COJ by reconstituting bulk frozen concentrated orange juice and selling it under its own labels and/or reselling COJ processed by others and sold under Beatrice's or the processor's labels. (CX 47A-Z–204)

219. Tropicana recognized as competitors dairies which sell their own brand of COJ in the retail market. (CX 527Z–10, no. 191; CX 593, p. 348)

220. In 1976 through 1978, Tropicana's western division sales manager reported that Tropicana's sales to 7/11s had been hurt by

the COJ packed in plastic jugs sold by the Beatrice milk plant in Salt Lake City. (CX 661A; CX 663C; CX 770A; Dutt 3825) The Beatrice dairy in Salt Lake City was packing a private label COJ under the Meadow Gold label, processed by Edwards Marketing. (CX 57L) Tropicana's vice president for sales reported that the 7/11 store managers preferred Meadow Gold COJ because of the store-door delivery. (CX 808C)

221. Reports of Tropicana sales personnel recognized as competitors Beatrice milk plants distributing COJ in Alabama, California, Florida, Ohio and Oklahoma. (CX 744A; CX 1301B; CX 922B; CX 753E; CX 807F; CX 808C, H; CX 593, p. 350)

222. Beatrice dairy plants delivered COJ to the warehouses of King Soopers grocery chain store in Denver (CX 528V) and IGA in Durham. (CX 47Z–38) The Beatrice dairy plant in Champaign has had a chain store warehouse pick up COJ [42] from its loading dock. (Parker 4384)

223. In 1977, King Soopers was a chain of approximately 46 retail grocery stores located in eastern Colorado. (CX 528U, no. 83; CX 1107B) Beatrice's Greeley, Colorado milk plant delivered Meadow Gold COJ to King Sooper's dairy warehouse in Denver for distribution to individual grocery stores by King Soopers. (CX 528V, no. 86) In 1977, Meadow Gold COJ was sold in 34 Denver area King Soopers grocery stores. (CX 528V, no. 85)

224. In 1977, Tropicana sold Tropicana brand COJ to King Soopers grocery stores and delivered COJ to the distribution warehouse in Denver. (CX 528V, X)

225. In 1977, Beatrice's San Jose milk plant sold Meadow Gold COJ to Fry's Food Stores, a chain of 25 stores, in San Francisco. (CX 528W, no. 90; CX 236E) Also in 1977, Tropicana sold Tropicana COJ to Fry's Food Stores in San Francisco. (CX 528W, no. 89)

226. In 1977, Beatrice's Meadow Gold and Tropicana's brand of COJ were both sold to grocery stores in the following 48 SMSAs (CX 47; CX 526I-M, Z–1–Z–5):

Akron, Ohio
Atlanta, Georgia
Birmingham, Alabama
Bloomington-Normal, Illinois
Bradenton, Florida
Canton, Ohio
Champaign-Urbana-Rautol, Illinois
Chattanooga, Tennessee
Cincinnati, Ohio
Colorado Springs, Colorado
Columbus, Ohio
Dayton, Ohio
Daytona Beach, Florida
Decatur, Illinois
Lynchburg, Virginia
Melbourne-Titusville-Cocoa, Florida
Miami, Florida
Oklahoma City, Oklahoma
Orlando, Florida
Panama City, Florida
Pensacola, Florida
Peoria, Illinois
Pueblo, Colorado
Roanoke, Virginia
St. Louis, Missouri
Salt Lake City-Ogden, Utah

Denver, Colorado
Fayetteville-Springdale, Arkansas
Fort Lauderdale, Florida
Fort Meyers, Florida
Fort Smith, Arkansas
Gadsden, Alabama
Gainesville, Florida
Hamilton-Middletown, Ohio
Huntsville, Alabama
Indianapolis, Indiana
Lakeland-Winterhaven, Florida
Lexington, Kentucky
Louisville, Kentucky
San Jose, California
Sarasota, Florida
Springfield, Missouri
Tallahassee, Florida
Tampa-St. Petersburg, Florida
Terre Haute, Indiana
Topeka, Kansas
Tulsa, Oklahoma
West Palm Beach-Boca Raton, Florida **[43]**

H. *Beatrice's Plans To Enter the Market*

a. Beatrice's Intent to Expand COJ Sales

227. In 1975, Beatrice was processing COJ at dairy plants in Gadsden, Honolulu, and Louisville. (CX 49A-B; CX 47Z–49; CX 47Z–5; CX 47Z–62)

228. In 1976, Beatrice urged its plant managers to process COJ for sales to schools because: "With capabilities of packaging orange juice . . . in various plants across the country, we are at a definite advantage." (CX 54)

229. Also in 1976, Beatrice requested Peter S. Goldman, an officer in a successful COJ processor, Johanna Farms, Inc., for an assessment of the feasibility of processing COJ, through a joint venture, using the Beatrice Deland (Orange City) dairy plant. After an inspection of the plant, Mr. Goldman rejected the idea on the grounds that an economical operation would have entailed a "very considerable investment." (CX 529A)

230. Realizing that the COJ market had more than doubled from 1971 to 1976 (77 million gallons in 1971, and 161 million gallons in 1976), Beatrice urged its plant managers to follow the example of the Beatrice milk plant in Tulsa which had successfully become a processor of COJ. (CX 3)

231. By February 28, 1978, COJ was processed by the following 12 Beatrice dairy plants (CX 47):

Boise, Idaho
Dayton, Ohio
Gadsden, Alabama
Greeley, Colorado
Honolulu, Hawaii
Lincoln, Nebraska
Louisville, Kentucky
Mattoon, Illinois
Minden, Louisiana
Reno, Nevada
Tulsa, Oklahoma
Zanesville, Ohio

b. Orange City Plant

232. In early 1977 Beatrice's Orange City milk plant, near Deland,

Florida had been losing money for two years because of the increase of transportation costs. (Polidoro 5376–77; 5381) The plant added a $120,000 packaging machine to increase production of paper cartons, which it could use to package COJ as well as milk. (Polidoro 5370) [44]

233. Since 1976 the plant had been packing and distributing COJ processed by Ardmore Farms of Deland, Florida. The processor squeezed the COJ from fresh oranges, pasturized it and delivered it to the Orange City plant in bulk tankers. (CX 62B; CX 94A; CX 125B; CX 47Z–189) The Orange City plant then packaged the COJ directly from the bulk tankers in gallon plastic containers, gave it a 21 day shelf life code, and distributed it under the Meadow Gold label. (CX 94A)

234. The Orange City plant also distributed Tropicana label COJ in glass containers which it had resold since 1970, and which amounted to 67% of its COJ sales in 1976 and 1977. (CX 47Z–93–94; CX 47Z–189)

235. By February 14, 1977, the Orange City plant manager had decided to expand sales by reselling COJ packed on his new machine to other Beatrice dairies. He saw a market for freshly squeezed COJ (as different from COJ made from concentrate). (CX 63B)

c. Dixie Sunshine

236. The Beatrice dairy marketing board was a committee of eight Beatrice dairy division executives, including the director of advertising and the four regional marketing directors, and a representative of Beatrice's advertising agency. The committee was chaired by the dairy division director of marketing. Top managers of Beatrice, such as James Dutt, then corporate executive vice president, and William Polidoro, dairy division executive vice president, attended meetings of the board. (CX 61; CX 117; CX 180) Mr. Dutt created the dairy marketing board. (CX 528Z–11)

237. One of the main purposes of the dairy marketing board was to generate and implement ideas for new products. (CX 528Z–10) It also provided marketing assistance to dairy plants (CX 528C); assessed each Beatrice plant for advertising of new products (CX 61B; CX 528Z–12, Z–22); approved names for new products (CX 528I); issued guidelines to dairy division plants concerning the advertising of dairy products (CX 528C); authorized advertising for new products (CX 528Z –12); and approved all advertising for dairy products. (CX 528Z–21)

238. On March 1, 1977, the dairy marketing board was briefed on the Orange City plant's plans to market fresh COJ (not made from concentrate). They also discussed the growing marketing opportunities for COJ packaged in paper containers and distributed by dairies. (CX 12A)

239. On April 4, 1977, the dairy marketing board [45] discussed the Orange City plant's packaging of COJ in paper and plastic and buying

a private label COJ in glass from Tropicana. (CX 12B)

240. On May 4, 1977, the dairy marketing board considered the name "Dixie Sunshine" as the Beatrice COJ to be distributed by the Orange City milk plant. (CX 12C)

241. By May 31, 1977, the brand name Dixie Sunshine had been adopted for the COJ to be processed by Ardmore Farms and packed by the Orange City plant. (CX 94A) For years Beatrice had used the label "Meadow Gold" for milk and for reconstituted COJ, and the dairy marketing board felt that this freshly squeezed COJ needed a new name. (Polidoro 5373)

242. By June 20, 1977, the dairy marketing board officials were deciding to expand the Dixie Sunshine program to include COJ packed in glass as well as paper and plastic, and had approached Tropicana to obtain a private label packed in glass quarts and half-gallons. (CX 101) By August 16, 1977, the dairy marketing board agreed that either Tropicana or Ardmore Farms should process the Dixie Sunshine glass containers. (CX 12C) In December 1977 Tropicana agreed to process the Dixie Sunshine COJ in glass. (French 5684)

243. In a meeting on July 12, 1977, the dairy marketing board decided that Dixie Sunshine COJ should be sold in markets as far as it could reasonably be shipped. (CX 12C) They were looking at the national market for COJ. (CX 110)

244. In the meeting on July 12, 1977 the dairy marketing board discussed competing with established brands of COJ like Tropicana by selling Dixie Sunshine at a lower price. (CX 12C)

245. By July of 1977, the dairy marketing board had considered expanding the sale of Dixie Sunshine by supplying 30–35 Beatrice milk plants that were already processing or could process COJ from frozen concentrate. They felt they could have national distribution in 18 months. At that time they looked at the introduction of Dixie Sunshine in Florida as a test market. (CX 121; CX 122; CX 124; Rosenberg 1172–73)

246. The planned production of Dixie Sunshine COJ in October 1977 was thwarted because of a shortage of fresh orange juice caused by the freeze in January 1977. Neither Ardmore Farms nor Tropicana could supply the Orange City plant for a short while. (French 5682)

247. In a national meeting of the Beatrice dairy division on November 15, 1977, held in Colorado Springs, the Dixie Sunshine COJ was introduced and promoted to plant managers from all Beatrice dairy plants by various Beatrice executives [46] including Wallace Rasmussen, Beatrice's chairman. (CX 140G,W)

248. In November 1977, the dairy marketing board appointed a "task force" composed of three Beatrice regional marketing directors to develop a marketing plan and pricing structure for Dixie Sunshine. They were to study the "wholesale prices of competitive products

(Tropicana, Minute Maid, Kraft, Hood, and private labels)," in Ohio and Alabama. (CX 143C; CX 107) In July of 1977, members of the board had studied COJ retail prices in Chicago and New York. (CX 109; CX 151)

249. In November 1977, Richard Voell, Beatrice chief corporate officer who negotiated the acquisition of Tropicana, became aware of the Dixie Sunshine program. (CX 2310C)

250. The Orange City plant was still losing money and in the fall of 1977 the decision was made to close the plant. The plant was closed on February 28, 1978. (Polidoro 5383)

251. Dixie Sunshine was being packaged in paper cartons by the Orange City plant by November 17, 1977. (CX 12C) By February 20, 1978, Tropicana was processing Dixie Sunshine COJ. (CX 168)

252. At the meeting on March 8, 1978, the dairy marketing board concluded that the Dixie Sunshine program would not be backed by advertising and that the paper packaging would cease. (CX 12E) The program stopped shortly thereafter. (French 5686–87)

I. *Beatrice's Ability To Expand Its COJ Operation*

253. The reconstituting of COJ by dairy milk plants has been responsible for much of the great growth of that market in recent years. (CX 593, p. 341; CX 911A; CX 1005C; CX 1084B; Jessup 2897)

254. Dairies process and package COJ on the same machinery used for the processing of milk. (CX 3D; CX 14D; CX 528S; RX 5D; RX 17H; RX 18D; Munkelt 724–25; Donovan 1292, 1300; Davis 3153; Dutt 3753–54, 3831; Parker 4313–18, 4320, 4393; Koch 4912–13; Piskac 5167; Brick 5292, 5295, 5314, 5318–19, 5325, 5335; Polidoro 5401–02)

255. A milk plant uses the same storage facilities for COJ and for milk. (Donovan 1293, 1300; Koch 4875)

256. The distribution system of milk plants and dairies can be used for the distribution of COJ to the retail market. (CX 663D; CX 770B; CX 995B; CX 1089B; CX 1160C; CX 1228; CX 1650, pp. 104–105; Lang 1067–69; Donovan 1300; [47] Jessup 2897–98; Parker 4393; Brick 5335)

257. Milk plants sometimes process COJ as an alternative to purchasing packaged juice from a processor such as Tropicana when the price of the packaged product gets too high. (CX 892A-E; CX 1221A-B)

258. Tropicana, in the early years of its existence, relied almost exclusively on dairies for the distribution of its COJ. (CX 1650, p. 104; Barnebey 3887) COJ, like milk, has a short shelf life, and the only dependable means of refrigerated distribution was by the dairies. (CX 1650, p. 105) Tropicana still uses dairies for some of the distribution of its COJ. (*e.g.* CX 1221B; CX 1223; CX 1233A-G; CX 1234; CX 1338A; CX 1342A-C)

259. COJ, with other dairy products marketed by milk plants, is marketed to consumers through the dairy case or, to a lesser extent, through the produce section of the grocery store. (CX 14F; CX 593, pp. 112, 116; CX 665C; CX 1251; Munkelt 714–15, 798–99; Lang 1052; Donovan 1310, 1313) Dairies selling COJ have an advantage in obtaining shelf space in the dairy case, having existing ties with the dairy case buyers. (CX 593, p. 325; Lang 1069–70; Donovan 1300, 1310)

260. Dairy products and COJ are subject to similar advertising and promotional techniques. (Donovan 1313) The reputation of a dairy's dairy products is of great assistance in the sale of COJ to grocery store customers. (CX 6F; CX 660B; CX 786B; Donovan 1313–16; Parker 4395)

261. In the past few years the number of milk plants in the United States has been declining. (CX 593, p. 349; Goldman 975; Donovan 1319; Mirapaul 1582–83; Davis 3182; Parker 4335–36; Karnes 4818; Koch 4899–4900; Greiner 5075; Brick 5305, 5332) The trend has been toward larger, more efficient dairies. In 1972 there were 1287 milk plants with 20 or more employees in the United States and in 1977 there were 907. (CX 598A-B)

262. Beatrice uses blow mold containers in its milk and COJ packaging at a number of its milk plants, and produces its own blow molded containers for use in its plants in Lincoln, Nebraska; Topeka, Kansas; Champaign, Illinois; Denver, Colorado; Salt Lake City, Utah and Alabama. (Piskac 5171–5174)

263. Beatrice sells milk in a broader geographic area than any other dairy in the United States. (Karnes 4809) Beatrice also operates more milk plants than any other dairy in the United States. (Karnes 4810)

264. In 1977, prior to its acquisition of Tropicana, Beatrice operated milk plants in 23 states, all of which plants [48] were capable of processing and selling COJ to the retail market (CX 526T; CX 528S, no. 76):

Alabama
California
Colorado
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Missouri
Montana
Nebraska
Nevada
Ohio
Oklahoma
Oregon
Texas
Utah
Virginia
West Virginia

265. Beatrice had dairy plants or distribution facilities in the following additional states (CX 526V, no. 75):

Arizona	New York
Maryland	North Carolina
Michigan	Pennsylvania
Minnesota	Tennessee
Mississippi	Wisconsin
New Jersey	Wyoming

266. In 1976, Beatrice operated eight refrigerated storage warehouses in New England, four in Florida, three in Chicago, one in Denver, three in Los Angeles, and one each in Scranton, Pennsylvania; Detroit, Michigan; Lincoln, Nebraska; Kansas City, Kansas; Denver, Colorado and the other in Allentown, Pennsylvania. (CX 18C; CX 19D; CX 28D)

267. Small dairies can encounter difficulty in processing and selling COJ. They may have their equipment already being used to full capacity producing milk, or may lack an assured supply of bulk FCOJ or the ability to produce a quality product, and they may not have a recognized brand name. (CX 915C; CX 1650, pp. 108–09; Mirapaul 1582; Jessup 3064–65; Davis 3165) Some dairies do not have sufficient refrigerated warehouse space and trucks available to make chain store warehouse deliveries although they do have the distribution system to deliver store-door. (CX 1650, pp. 105–106; Parker 4321)

268. In 1978, the Beatrice Greeley plant reconstituted and transferred COJ to other Beatrice plants or facilities in Pueblo, Colorado Springs, Grand Junction, and Denver, Colorado; Salt Lake City, Utah; Topeka and Wichita, Kansas; Lincoln, Nebraska; St. Joseph, Missouri; and Ottumwa, Iowa. (CX 521, pp. 9–11; Piskac 5102–03)

269. Beatrice's Mattoon plant reconstitutes COJ and [49] supplies COJ to Beatrice's milk plant in Champaign. (Parker 4313, 4388) Beatrice's Dayton plant reconstitutes and supplies COJ to the Westerville, Lima and New Bremen, Ohio plants. (Koch 4912, 4918, 4974)

270. Because of the perishability of their products and transportation costs, most dairies, delivering store-door, sell to customers in a radius of 150 miles from their plant, although some will try to deliver store-door up to 400 miles from the dairy. (CX 204K; CX 218J; CX 202K; Brick 5294; Polidoro 5379) Delivering to warehouses, however, COJ processors, including dairies, can effectively sell up to 500 miles from their plant. (Munkelt 718–20, 854; Goldman 961–63, 1010; Lang 1056, 1131; Donovan 1296–97)

271. Johanna Farms delivers COJ store-door and recently to chain store warehouses. (Goldman 974, 1019) Some chain store warehouses pick up direct COJ from the processor. (Goldman 994, 1019)

272. In 10 years Hood's delivery of COJ to the warehouses of grocery chains has gone from almost nothing to about 40% of its sales. (Donovan 1309, 1312)

273. In 1971, about 15% of the COJ produced by Home Juice was delivered to warehouses. By 1979, warehouse delivery accounted for approximately 50% of Home Juice's COJ shipments. (Lang 1063–64)

274. Beatrice has semitrailers and van trailers necessary to deliver COJ to warehouses. (RX 121A, Parker 4308, 4321, 4389–90; Koch 4872, 4898, 4926) For example, Beatrice's Lincoln plant owns 13 trucks of the 40 foot size. (Piskac 5184) These trucks are used to haul its products including COJ to its branches and its distributors. (Piskac 5184, 5188–89, 5194–96, 5201–05, 5239–40)

275. Beatrice delivers milk and other dairy products by its refrigerated truck fleet to the customer's store or warehouse, and to a lesser extent to the consumer's home. (CX 16B; CX 17B; CX 18, p. 2; CX 19B; CX 20D; CX 21C; CX 22, p. 38; Dutt 3798; Koch 4871, 4935)

276. The Beatrice Champaign milk plant serves a warehouse account through pick up at its dock. (Parker 4384; Polidoro 5403, 5427) From 1973 to 1975, Beatrice's Dayton plant delivered dairy products to a warehouse which serviced 75–80 convenience store outlets. (Koch 4952–53)

277. Beatrice's Mattoon plant manager would like to sell COJ via warehouse delivery. (Parker 4413, 4384) Beatrice milk plants could save money on transportation costs by having to make only one stop rather than incurring the costs of many **[50]** stops at individual stores. (Parker 4384–85; Koch 4954–55)

278. In 1978 Beatrice operated a large refrigerated truck fleet based at its New Bremen, Ohio plant. (Granger 4531–32; RX 121H) The fleet has been used to transport COJ between the processing plants and distribution centers. (Koch 4927)

279. Beatrice has 1,400 food brokers selling its products in the United States. Brokers are an effective method of obtaining access to shelf space in grocery stores. (CX 18B)

280. In 1978, Beatrice spent $150,000,000 on advertising and projected spending from $170,000,000 to $175,000,000 in 1979. (CX 192B; Dutt 3795–96) Its advertising expenses ranked 17th among all industrial corporations in the United States. (CX 192B)

281. The production, distribution and marketing of COJ and yogurt are similar. Both products are processed in dairy plants and require refrigerated storage and delivery facilities due to short shelf life; they are distributed to grocery stores and sold to the dairy buyer and placed in the dairy case of grocery stores. (Dutt 3814–18)

282. Dannon yogurt was sold only in the New York metropolitan area when it was acquired by Beatrice in 1959. (CX 29D; CX 527Z–66;

Dutt 3814; Karnes 4757) Dannon is now sold coast to coast by Beatrice's dairy division. (Dutt 3814–15; Karnes 4757)

283. Beatrice distributes Dannon Yogurt coast to coast using a store-door delivery system. (CX 2E; Dutt 3817; Karnes 4757–58) Johanna Farms and other firms distribute yogurt and COJ to warehouses of chain grocery store customers. (Goldman 972–73; Dutt 3816–18; Karnes 4760)

284. Prior to its acquisition of Tropicana, Beatrice processed and distributed COJ in Australia by its subsidiary, Patra Holdings Pty. Ltd. ("Patra"). (CX 527–58, 70, 71, 74, 76, 81, 82)

285. Under Beatrice's ownership, Patra's COJ processing operations have been expanded. (CX 24F; CX 26F; CX 29I; CX 463A-B)

286. Beatrice executives learned production and marketing skills through Patra which could be used in this country. (CX 144A; CX 436–81)

287. A major corporate objective of Beatrice is to expand its products with local distribution into national distribution. (CX 2B; CX 527"O"; CX 1553; Dutt 3796, 3816; Karnes 4802–04) **[51]**

288. Milk plants which process COJ achieve more efficient distribution of their milk through combined deliveries of milk and COJ. (Goldman 1021–22; Dutt 3754, 3830–31) Dairies have added products to their milk trucks in order to reduce distribution costs. (Goldman 1022; Dutt 3754; Parker 4391)

289. Milk is a low margin product compared to most food items. (CX 1250B; Karnes 4751) COJ is a high margin product compared to other food products. (Karnes 4790)

290. Because of the higher profitability of COJ sold to the retail market compared to milk, and the excess capacity in almost all of Beatrice's milk plants, Beatrice had an economic incentive to expand its retail COJ business. (CX 14C; CX 29D; CX 202–CX 295; CX 528Z–20; Dutt 3754; Karnes 4790)

291. Dairy companies such as Hood, Johanna Farms, Dean, Knudsen and Foremost-McKesson have successfully entered the market by selling COJ to grocery stores along with their other dairy products. (CX 14B; CX 593, pp. 270, 272–73; CX 807F; CX 1086C; CX 1650, pp. 92–93, 100–101; Lang 1132; Jessup 2799; Barnebey 4049–50, 4053; Brick 5312–13)

292. Johanna Farms delivers COJ along with yogurt to chain grocery store warehouses and delivers COJ along with all its dairy products including milk store-door to other grocery stores. (Goldman 972–73, 994, 1021–22)

J. *Entrenchment*

293. A processor of fresh COJ shipping from Florida to other states incurs higher freight costs than a milk plant which buys bulk concentrate and reconstitutes COJ near the grocery store customers. (CX 1005B; CX 1007B; CX 1009A; CX 1650, pp. 169–71; Munkelt 824–29; Goldman 1024–25; Mirapaul 158)

294. Freight cost is relatively greater for glass containers than other COJ containers due to their heavier weight. (Miller 1513–14) The share of the retail COJ market packed in glass has been decreasing. (CX 915B; Munkelt 827; Lang 1102; Miller 1513–14; Hoffer 1952; Jessup 3114; Barnebey 4005)

295. In 1971, Minute Maid started processing and selling COJ and was selling COJ nationally by 1979. Minute Maid gradually established COJ processing facilities in Florida, California, and New Jersey and entered into co-packing arrangements with dairies in Boston, Massachusetts; Madison, Wisconsin; Indianapolis, Indiana; and Burkburnett, Texas (near Wichita Falls, Texas). (CX 1005A; Munkelt 718–19, 724; Barnebey [52] 3954, 4091–92; Brick 5313–14) Tropicana recognizes that co-packing arrangements with regional dairies gives Minute Maid a great cost savings. (CX 738b) Each of these seven locations processes bulk FCOJ obtained from Minute Maid's Auburndale, Florida facility. (Munkelt 721)

296. In 1977, Kraft entered into a co-packing arrangement with Sunkist to serve West Coast customers. (CX 992B; Miller 1484) Under this arrangement, the COJ is produced under the Kraft brand and specifications, and Kraft markets it. (Miller 1484–85) Kraft entered into the co-packing arrangement to lower its distribution costs on the West Coast. (Miller 1510) Kraft's Sealtest dairy in St. Louis began reconstituting COJ about three years ago. (Jessup 3145)

297. Prior to 1976, Hood processed COJ only at its Florida plant. (Donovan 1305) Now, 75% of its COJ for the retail market is processed at Hood's dairy plants in the northeast. (Donovan 1291–92, 1294–95)

298. Some dairies far from Florida have reconstituted COJ and sold it under their own label rather than paying the high cost of transportation for Tropicana. (CX 740B; CX 743A) Tropicana in 1977–78 had difficulty selling COJ in Salt Lake City, Utah, due to the cost of transporting and competition from other processors. (CX 661C-D; CX 663D-E; Barnebey 3928–29) Tropicana tried to sell COJ to the Beatrice dairy in Salt Lake but the dairy reconstituted COJ itself at a cost less than Tropicana's price. (CX 663D; CX 664E; CX 665F; CX 770B; Barnebey 3931)

299. There is an industry trend toward increased processing of COJ

from bulk FCOJ at dairies outside Florida. (CX 1650, pp. 27–29; Tilley 2290–91; Jessup 2897–98; Barnebey 3997–98, 4006)

300. Prior to its acquisition by Beatrice, Tropicana was interested in expanding its sales of COJ throughout the United States, particularly in the middle west and west where it is relatively the weakest. (Barnebey 4040)

301. Tropicana has recently considered shipping bulk FCOJ to a California dairy, and processing and distributing it, under a different label. (CX 811A-B)

302. Tropicana has been interested in acquiring a processor of COJ in California. (CX 528Z–26) Because of increased freight rates, Tropicana purchased a plant site in California in 1977 with the idea of reconstituting COJ there. (Barnebey 3972–73) The plant was not built because of high costs involved. (Barnebey 3973) It is likely that in the next ten years Tropicana will have a plant reconstituting COJ in California. The glass packed fresh COJ will continue to be **[53]** shipped from Florida. (CX 1650, p. 169–71)

DISCUSSION

The following discussion summarizes and supplements the findings of fact and presents conclusions of law.

A. *Introduction*

In the early days oranges were sold by food stores to consumers who took them home, squeezed the fruit and drank the juice. In the 1930's the canning process for orange juice was developed. In the mid 1940's the process of concentrating orange juice was developed, and in the early 1950's chilled orange juice (COJ) was introduced. (Barnebey 3904)

COJ is processed almost always entirely from oranges grown in Florida. (findings 100, 114) Oranges from other states are too sour or sweet or have a low juice content. (finding 114) Processors obtain the juice either by squeezing fresh oranges or blending water with frozen concentrated orange juice (called "reconstituting") or by melting frozen natural strength orange juice. (finding 63) They package the COJ for resale in grocery stores in glass bottles, paper cartons or plastic jugs. (finding 64) They distribute the COJ by delivery to chain grocery stores or the chain's warehouse, to smaller independent grocery stores, and to wholesalers. (finding 77)

Tropicana was founded by Anthony T. Rossi who was the chairman of the board and chief executive officer from its inception through its acquisition by Beatrice. In 28 years the company grew entirely through internal growth to be the largest citrus processor in the world. (CX 39, p. 2) In fiscal 1977, Tropicana had net sales of $244,583,-

000 and earnings after taxes of $22,461,000. (finding 10) Tropicana, the leading processor of COJ with over 30% of the retail market (finding 149), distributes primarily to the warehouse of grocery chain stores and to grocery wholesalers from warehouses across the country which it supplies by rail or trucks. (findings 145, 150, 155) Every five days, a train of Tropicana refrigerated rail cars, over one mile long, leaves the Bradenton plant for the warehouse in New Jersey. (finding 157) Although it sells in every state but Hawaii and Alaska (findings 110, 148), Tropicana is strongest on the east coast and markets closest to its plant in Florida. (finding 147) Transportation costs have limited its effectiveness in markets in the far west. (CX 661D) Tropicana is the price leader in the sale of COJ. (CX 153) [54]

Before the merger Beatrice was the 37th largest industrial corporation in the country, with over $6 billion in sales in fiscal 1978. (finding 2) Beatrice operates the nation's third largest dairy, with 37 milk plants and many other plants producing dairy products. (finding 5; CX 47) It operates more milk plants and has the widest geographic sales area of any dairy in the country, and distributes products in 35 states. (findings 5, 263, 264)

In 1975, Beatrice processed COJ at three dairy plants. (finding 227) Realizing that the COJ market was expanding rapidly, and that COJ is a high margin product compared to milk, Beatrice increased its processing of COJ and by the time of the merger it processed COJ at 12 plants (findings 230, 231, 289) and had about .35% of the market measured in gallons of COJ sold to grocery stores in the United States. (finding 214)[9] Beatrice also distributed COJ processed by other firms including Tropicana. (findings 206, 212; CX 47) In addition, just before the merger, Beatrice was completing plans to enter the retail COJ market with a strong, national effort to process, distribute and sell a COJ product which was to be called "Dixie Sunshine." (findings 237–52)

Three COJ processors sell nationally: Tropicana, Minute Maid division of The Coca-Cola Company and Kraft, Inc. H.P. Hood, Inc., a New England dairy, is the fourth largest seller, processing and selling in the northeastern and southeastern United States. (findings 101, 113) Tropicana distributes fresh and reconstituted COJ from its plant in Florida to the nation (findings 65, 110), and packages its COJ for the retail market in glass and paper containers. (finding 154) Minute Maid processes COJ by shipping bulk concentrate from Florida to seven processing plants across the country, and by packaging the reconstituted COJ in paper cartons. (finding 111) Kraft packs fresh and reconstituted COJ in glass bottles at its plant in Florida and

[9] I accept the Nielsen surveys in the record as more accurate evidence of the market than the testimony of respondents' paid expert. (CSC reply at pp. 78–84)

distributes to most of the country. It serves the west coast and Hawaii by a co-packing arrangement with a plant in California. (findings 66, 74, 112) Hood packs fresh and reconstituted COJ in paper and plastic at its plant in Florida and its milk plants in New England. (findings 66, 74, 113)

Hundreds of dairies, including Beatrice, also process and sell COJ to the retail market by mixing bulk concentrate with water, using the same equipment and packages they use in packing milk, and delivering to their milk customers at [55] individual grocery stores and to grocery chain warehouses. (findings 134, 253–261) These local and regional sellers of COJ depend primarily on a lower price to obtain shelf space in grocery stores. For example, before the merger, Beatrice processed and sold COJ to grocery stores at a price which allowed consumers to buy it at a per serving price which was 25% to 35% lower than national brands of COJ like Tropicana. (finding 217)

In the last ten years COJ sold through grocery stores has been a fast growing industry and now, of the entire orange juice market, COJ accounts for about 28% and frozen concentrated orange juice (FCOJ) accounts for 68%. (finding 57)[10] Consumers increasingly are buying COJ as a convenience product. It is ready-to-serve and requires no additional preparation. (Barnebey 4063) Consumers feel they are getting a purer product when they buy COJ, rather than FCOJ. (finding 60) This characteristic of consumers, preferring the quick drink of COJ rather than taking the time to mix FCOJ (which is cheaper, lighter and can be easily stored), is somewhat difficult to understand. It may be due, in large measure, to the advertising and promotion of COJ by the larger processors, such as Tropicana and Minute Maid. (CX 141F)[11]

The use of heavy advertising to enter new COJ markets is seen in the recent entry of Minute Maid COJ. Minute Maid, a division of The Coca-Cola Company, had 25,000 acres of orange groves in Florida and started selling COJ in 1960, but, because of a freeze in Florida, withdrew from the market in 1961. (Munkelt 761) In 1970 Minute Maid again started processing and selling COJ, opening one processing facility at a time, either by buying milk plants or by co-packing arrangements with COJ processors. Minute Maid COJ is now processed from bulk concentrate shipped from its Florida plant to its seven processing plants across the country, where it is reconstituted and packed in paper cartons. Minute Maid entered each new market with a program of high advertising and promotional expenditures. (Munkelt 792) In 1975, Minute Maid had 6.2% of the national retail COJ

[10] Canned orange juice accounts for about 4% of the industry. *Id.*

[11] One result of this advertising and promotion by the larger processors is that, while private label sales are 50% of all FCOJ sold at retail, they amount to only 19% of COJ retail sales. (finding 50)

market (CX 392, p. 38), and by 1979, it had 19.4% and was selling nationally. (CX 560Z–18; Munkelt 718) Most of this market share was taken from local and regional COJ [56] processors. (Munkelt 788–89)[12]

During this time Tropicana was holding its national market share, having 28.9% in 1975 and 30.5% in the summer of 1979. (finding 122; CX 560Z–18)[13] Tropicana responded to each incursion by Minute Maid into a new market by retaliatory advertising and promotional programs. (Munkelt 805)

B. *Relevant Product Market*

To test whether an acquisition may substantially lessen competition, the area of effective competition must be determined by reference to a product market. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324 (1962). The outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. *Id.* at 325. Within the broad market, well-defined submarkets may exist which constitute product markets for antitrust purposes, and the boundaries of such subsmarkets may be determined by looking at:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. (*Id.* at 325)

Not all of these criteria must be met before a relevant submarket is found. *Brown Shoe,* 370 U.S. at 326; *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 276–77 (1964).

The evidence here overwhelmingly shows a separate relevant product market of COJ sold to the retail market. The industry and government agencies, the public and the respondents themselves have recognized that market. (findings 23–39, 41–45, 71–75) COJ has peculiar characteristics which differentiate it from FCOJ and CSSOJ. It is ready to serve whereas FCOJ must be [57] thawed and have water added. (CX 593, pp. 28–29) COJ does not have the quality problems of CSSOJ. (findings 60, 62) COJ has distinct prices (findings 47, 48, 76, 99) and customers. (Barnebey 4063; Hoffer 1929) It has unique production, packaging, storage and distribution facilities (findings 51–53, 56) and specialized vendors and display areas in retail grocery stores. (findings 36, 55, 56)

While the record contains scattered proof relating to effects of the acquisition on the submarket of processing COJ (findings 126, 128,

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[12] Kraft, the other national processor and seller of COJ to the retail market also lost national market share during this period. (findings 122, 123) Kraft depends on general advertising of its dairy products and does not advertise its COJ brand to the consuming public. (Munkelt 805)

[13] Tropicana also had over 2% of the market in its sales of private label COJ. (finding 149)

130) and on the submarket of distributing COJ (finding 159), most of the evidence is centered on the market of processing, distributing and selling COJ to retail food stores and that is the relevant market in this case.

C. *Geographic Market*

This merger had its most evident effect in the geographic area where both the acquired and the acquiring companies sold COJ to the same kind of customers. That is where the impact of the merger will be most clearly felt and most easily measured. In addition to the effects on horizontal competition between Tropicana and Beatrice, however, the complaint alleges, in paragraph fifteen, unlawful effects from the merger on the COJ retail market: that competition may be lessened among competitors generally;[14] that Tropicana may be eliminated as an independent competitor;[15] that concentration may be increased and the chance for deconcentration diminished;[16] and that mergers among other processors may be encouraged.[17] The market facts below show that these issues must be examined on a national market basis.[18] **[58]**

Tropicana sold COJ to retail grocery stores in 48 states (finding 156) in 242 of the 282 metropolitan areas in the United States. (finding 148) Most of its sales are on the east coast, in the states bordering the Gulf of Mexico, and in large metropolitan areas. (finding 147) Nevertheless, Tropicana ships its COJ to the west coast from its plant in Florida (finding 110), and advertises and tries to sell throughout the United States. (findings 104, 107) These facts alone are sufficient to show that the nation is the relevant geographic market. *United States* v. *Marine Bancorporation, Inc.,* 418 U.S. 602, 621 (1974); *Jim Walter Corp.* v. *Federal Trade Commission,* 5 Trade Reg. Rep. ¶63,535 (5th Cir., Sept. 12, 1980), at p. 76,878–79 [625 F.2d 676].

Beatrice, with a very small share of the national market, sold COJ in 23 states (finding 264) through 43 dairy plants (findings 160–202), and had plans to sell on an expanding basis, and eventually to sell nationally. (findings 243–45, 247–48) Furthermore, the market is increasingly acquiring a national character. *Kennecott Copper Corp.* v. *Federal Trade Commission,* 467 F.2d 67, 71 (10th Cir. 1972). The three largest brands of COJ, with a growing share of the market (findings 122, 123), sell nationally. (finding 101)

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[14] Subparagraph (b) and (f)

[15] Subparagraph (c)

[16] Subparagraph (d)

[17] Subparagraph (e)

[18] For example, as proof that the merger diminishes the chance for deconcentration, complaint counsel allege that Beatrice's market share understated its future competitive impact because of the planned national expansion of Dixie Sunshine. Assuming that the allegation has merit, the geographic area to test that expansion would necessarily be national.

These facts compel a finding that the nation as a whole constitutes the relevant market. *Beatrice Foods Co.,* 86 FTC 1, 60 (1975), *aff'd,* 540 F.2d 303 (7th Cir. 1976). That freight costs are a significant factor (finding 293) giving an advantage to a seller with a plant located closer to the customer, does not foreclose firms from selling nationwide. *Id.*[19] Further, the complaint in this case alleges injury from the merger to other processors of COJ. Hundreds of dairies process COJ in this country (findings 134, 261), and many of them compete against Tropicana in the areas of the country where Beatrice does not now sell. (*e.g.* finding 113)

The effects of the merger should be weighed on a national scale. **[59]**

D. *Competitive Effects*

After determining the relevant market, the next step is to ascertain whether the probable effects of the acquisition may be substantially to lessen competition in the market. Statistics reflecting market shares and concentration are the primary index of this effect. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 326–66 (1963). Where concentration in a market is already great, an acquisition which results in even small increases of market share will be presumptively unlawful. *United States* v. *General Dynamics,* 415 U.S. 486, 497 (1974).

The test for market effect of a horizontal merger was recently stated in *Hublein, Inc.,* 3 Trade Reg. Rep. (CCH) ¶ 21,763 (Docket 8904, Commission order issued October 7, 1980) [96 F.T.C. 385]. In *Hublein,* the merger involved market shares of 17.9% and .79% in the all wine market.[20] The Commission found, on consideration of the conventional elements of horizontal merger theory in a rapidly growing industry, that the increase in concentration resulting from the merger was not likely to produce significant anticompetitive effects. The Commission found that Hublein's market share of .79% in the all wine market overstated the competition between it and the acquired company because: (1) the two sold markedly different products at different ends of the price scale of wines; (2) Hublein had no special marketing skills and numerous other firms with a small share of the market were equally important future competitive factors; and (3) a three year increase in four firm concentration went from 47% in 1968 to 56.7% in 1971 after the merger, and then decreased to 54.2% in 1976.

Applying the *Hublein* test for market effect of horizontal mergers

[19] In *Federal Trade Commission* v. *Proctor & Gamble,* 386 U.S. 568, 571 (1967), a national market was found even though it was not practical to ship the product more than 300 miles from the plant because of high shipping cost and the acquired firm was the only company having plants throughout the country.

[20] Other market ratios in the *Hublein* case were 15.6% and .23% in table wine and 21% and .54% in dessert wine. The Commission did not consider these submarkets because these market shares do not substantially differ from the market share of the all wine market. *Hublein* at p. 21,939.

to this case, I find that the first two factors are inconclusive. The Tropicana COJ and the COJ processed and sold by Beatrice are not disparate products to the same extent that the wines in *Hublein* sold by the acquiring and acquired firms differed in price, quality and sweetness. The main difference between the COJ processed and sold by Beatrice and Tropicana is in price with Beatrice selling at retail for 25%–35% lower than Tropicana. (finding 217) The quality of the two products does not vary significantly. (findings 60, 70) Although Tropicana's COJ in glass has a longer shelf life than Beatrice's reconstituted COJ packaged in paper or plastic (finding 61), consumers perceive little difference in [60] Tropicana's COJ packed in paper cartons (which amounts to almost 70% of Tropicana's sales of COJ)[21] and Beatrice COJ. (finding 70)

The Commission also found that Hublein had no special marketing skills. In this case, while there is no showing that Beatrice has unique innovative or marketing skills, there is proof in the record that Beatrice had a great potential capacity for marketing COJ and has skills obtained from a successful subsidiary processing COJ in Australia. (findings 253–92)

The factor which clearly distinguishes this case from *Hublein,* however, is the trend toward concentration in the COJ industry. The top four companies in the national COJ market controlled 55.8% of the gallon sales in 1975. (finding 122) By 1978 the four leading brands sold in grocery stores had 60.2%, (finding 123) and a few months after the merger, in June-July 1979, they had 64.2%. (CX 560Z–18)[22] Further, the top two COJ firms had more than 50% of the gallons sold in that period (*id.*), perhaps an even greater indicator in predicting "interdependent anticompetitive behavior." *Hublein* at p. 21,939.

Beatrice's small market share of .35% does not automatically mean that the competitive effect of the merger was *de minimis.* In *Federal Trade Commission* v. *Pepsico, Inc.,* 477 F.2d 24 (2d Cir. 1973), a horizontal merger case for preliminary relief, the court of appeals upheld the finding that there was a reasonable probability of competitive injury resulting from an acquisition by Pepsico, with 16.3% of the market, of a company with .3% of the market, in a highly concentrated, growing [61] industry. *United States* v. *Crowell, Collier & MacMillan, Inc.,* 361 F.Supp. 983 (S.D.N.Y. 1973) does not help respondents.

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[21] (finding 149)

[22] The legality of a merger under Section 7 is to be tested by whether at the time of the suit there is a reasonable probability that the acquisition will lessen competition. *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 589 (1957); *United States* v. *Penn-Olin Co.,* 378 U.S. 158, 168 (1964). However, post-acquisition evidence is admissible to confirm trends in the relevant market perceived at the time of the merger. *United States* v. *Falstaff Brewing Corp.,* 383 F. Supp. 1020, 1027 (D.R.I. 1974).

Adding Tropicana's private label sales of more than 2% of the market (finding 149), the four firm concentration ratio now approaches being "highly concentrated" by the FTC standard. *Federal Trade Commission* v. *Pepsico, Inc.,* 477 F.2d 24, 27 n.5 (2d Cir. 1973).

Crowell, Collier, with .6% of the market, acquired the leading firm in that market. The district court refused to find a horizontal violation even though the four leading firms' concentration was 69.6% and the acquired firm had 41.9%. There was, however, no trend toward concentration nor any other anticompetitive factors. In *United States* v. *Aluminum Co. of America,* 377 U.S. 271 (1964) and *Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498 (2nd Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the facts were closer to this case. In *Alcoa* the percentage increases were 1.3% plus 27.8% and in *Stanley,* 1% plus 22–24%. Both cases involved the largest firms in their markets just as Tropicana is the largest COJ producer. In *Alcoa,* the top two firms controlled 50% of the market and there was a trend toward concentration. In *Stanley Works* the top four firm concentration was 50% and there was evidence the acquisition would turn the concentrated market into a rigid market with limited price competition and lead to greater concentration.

Here, the trend toward concentration was primarily caused by the rapid expansion of Minute Maid, which had gone from 7.3% in 1975 to 19.4% in the summer of 1979, and the increased advertising expenditures by Tropicana stirred up by Minute Maid's market invasions. (finding 122; CX 560Z–18; Munkelt 805) This market share has been taken primarily from the local and regional COJ processors (Munkelt 788–89), thus depriving the market of brands which compete by lowering prices (finding 217) and substituting competition by advertising and product differentiation. (Munkelt 792, 805; Lang 1065)

While the share of the market by Beatrice prior to the merger was extremely small (finding 214), I feel that the .35% of the retail market substantially understated competition between Beatrice and Tropicana in selling COJ to grocery stores because of Beatrice's recent growing interest in processing COJ (findings 227–231), and its unusual potential capacity for marketing that product. (findings 253–266, 274, 284–86) Furthermore, this small market share must be considered in the context of being added to Tropicana's more than 30%. In a concentrated relevant market even this small increase in market share is presumptively unlawful. *United States* v. *General Dynamics,* 415 U.S. at 497. Respondents have not successfully rebutted that presumption.

Respondents argue that Beatrice and Tropicana did not compete for chain store customers because Beatrice delivers only store-door while Tropicana delivers to the warehouses of chain stores. However, Tropicana and other processors who deliver COJ to chain warehouses recognize as competitors dairies delivering COJ store-door. (findings 87–92) Some chains prefer store-door delivery and Tropicana has lost shelf space to dairies **[62]** delivering store-door. (findings 88, 93) For

example, in Salt Lake City Beatrice beat Tropicana for sales of COJ to a chain store by this extra service. (finding 220)

The record shows that Beatrice and Tropicana regarded each other as competitors in the processing, sale and distribution of COJ to retail food stores. (findings 76, 221; Koch 4954) The record shows instances where Beatrice milk plants and Tropicana sold or tried to sell COJ to the same chain food stores (findings 220, 222–25) and they vied for sales to grocery stores in at least 48 metropolitan areas. (226)

Respondents also argue that Beatrice could not deliver to the warehouses of chains because of union contracts with their truck drivers. No such executed contracts were put in evidence, nor was there any explanation why they could not be renegotiated if such contracts do exist. Furthermore, some Beatrice milk plants have serviced chain food stores by delivery to the warehouse or through pick up by the chain at the dairy (finding 276) and other Beatrice dairies were fully capable of doing so (findings 274, 277, 278) just as other dairies have expanded their COJ sales by delivering to chain store warehouses. (findings 272, 273, 292)

E. *Entry Barriers*

The strongest argument made by respondents to show that the merger does not tend substantially to lessen competition is that the barriers to entering the processing and distribution of COJ to grocery stores are relatively low for dairy companies. (findings 134–35)[23]

Dairies, the most likely potential entrants into the processing of COJ, typically undersell the national brands of COJ by offering a lower price. (finding 217) There are hundreds of these dairies waiting on the edge of the COJ market to supplement their gross income and to defray their **[63]** distribution costs by processing and distributing COJ. They just add tap water to FCOJ, and use the same production equipment, distribution facilities and personnel they use to sell milk. (findings 134–35, 228, 253–60) The only additional cost is for bulk concentrate. The dairy merely calls a concentrate supplier in Florida, flushes the milk from the production equipment with boiling water, and is quickly into the business of processing and distributing COJ. (Parker 4309, 4313, 4317)

Unfortunately, however, local and regional dairy processors of COJ are becoming an increasingly less important factor in grocery stores across the country. (findings 122–23) Supplies of bulk FCOJ are not always available to the prospective new entrant into the business of

[23] Respondents also argued that chain stores are potential entrants by private label COJ. Such new competition would be in the market for selling COJ at retail but there is no evidence that additional private labels would have a substantial effect on the processing of COJ. Respondents also argue that firms which concentrate FCOJ in Florida are potential entrants. These firms lack an assured supply of oranges, equipment, sales force and established brand names, and are unlikely entrants into the business of processing COJ. (Bock 1656–64)

processing and distributing COJ to food stores (findings 141, 246) and other barriers are there. (finding 267) The national COJ processors, with their powerful advertising budgets, are winning an ever growing market share. (findings 122–23) A small COJ processor testified about this (Lang 1065):

> As a regional packer, again we are competing with nationally-known, well advertised, well-promoted competitive products who by and large almost automatically are represented in every store and for a local brand, such as ourselves, we are fighting for what is left of that space in the dairy case. It's a very difficult job to compete with these nationally known brands for shelf space in view of the fact that our company cannot afford to advertise anywhere near as significantly as our competitors do.

Absence of high entry barriers, moreover, cannot be depended upon to ensure effectively competitive conditions. *Ekco Products Co.,* 65 F.T.C. 1163, 1208 (1964), *aff'd,* 347 F.2d 745 (7th Cir. 1965):

> A merger may violate Section 7 even though there do not appear to be formidable barriers to entry into the market affected by the acquisition; the existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry.

The reasons that low entry barriers are not a defense to a Section 7 violation are because (1) entry by significant new **[64]** competitors is likely to be at best a long term affair and (2) even an entry-discouraging low price is not likely to be as low as if there were actual competition. *Id.* at 1208.

F. *Conglomerate Theories*

Complaint counsel argue that the complaint alleges not only unlawful effects from the merger on actual competition but also unlawful future effects in that the "possibilities for eventual deconcentration may be diminished." They argue that the merger will entrench Tropicana as the leading processor of COJ sold to food stores and already has eliminated Beatrice's planned role as a deconcentrator through the introduction of the Dixie Sunshine brand of COJ.

Respondents argue that complaint counsel, in pointing to the future effects of the merger, were trying to prove a violation based upon theories which were not pled in the complaint. They argue that actual and potential competition are not interchangeable concepts.

In addition to the traditional horizontal theory of the complaint, the Commission in *Hublein* also decided the case under conglomerate theories, holding that Hublein was not a unique potential deconcentrator of the market and that the merger did not entrench the acquired company's market position. The Commission looked at these

conglomerate theories both as an independent basis of violation and also as an aggravating factor in the alleged horizontal violation. *Hublein* at p. 21,942.

Section 7's incipiency standard requires not merely an appraisal of the immediate impact of the merger upon competition, but also a prediction of its impact upon competitive conditions in the future. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362 (1963); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 322 n.38 (1962). Therefore, even in a horizontal merger case, the future effects of the merger must be weighed. *Hublein, supra; Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498, 502 n.8, 505 (1972), *cert. denied,* 412 U.S. 928 (1973).

G. *Dixie Sunshine*

In the middle 1970's Beatrice grew interested in the processing of COJ, since that market was expanding quickly and was a complement to the processing and distribution of milk. (findings 228–30, 253–60, 288–90) From 1975 to 1978 Beatrice expanded its COJ processing from three to twelve dairy plants. (findings 227, 231) **[65]**

In early 1977, the highest executives in the Beatrice dairy division became interested in expanding the COJ processing business more rapidly. (finding 236, 237) This plan included a new label COJ to be sold by Beatrice—Dixie Sunshine.

The test market stage for Dixie Sunshine included distributing COJ processed and packed in glass bottles under that label by Tropicana, and packaging fresh orange juice supplied by Admore Farms in paper cartons at the Beatrice milk plant in Orange City, Florida. (finding 241, 242) The Beatrice dairy division executives soon started thinking about a national market for Dixie Sunshine COJ, with COJ to be reconstituted by Beatrice at 30 to 35 milk plants with national distribution in 18 months. (findings 243, 245, 248)

Just as Dixie Sunshine was coming on the market, Beatrice bought Tropicana. The merger was approved by the Beatrice board of directors on March 4, 1978. (finding 19) At a meeting on March 8, 1978, Beatrice dairy division executives stopped the Dixie Sunshine program. (finding 252)

Beatrice had a unique ability to enter the business of processing and distributing COJ on a national level. Dairies process and package COJ on the same machinery used for processing milk. (findings 254, 262) Milk plants use the same storage facilities and distribution system for milk and COJ and generally find the products compatible. (findings 255, 256, 258–60) Beatrice has more milk plants and sells in a wider geographic area than any other dairy in the United States.

The likelihood of Beatrice expanding the business of processing,

distributing and selling COJ was eliminated by the merger, thus reducing the chance for deconcentration in the market.

H. *Entrenchment*

A large acquiring firm can confer on an acquired firm competitive advantages over competitors in the acquired firm's market and those advantages may substantially reshape the competitive structure of the industry by raising entry barriers and by dissuading smaller firms from aggressively competing. *Hublein* at p. 21,948.

Here, complaint counsel argue that the acquisition conferred on Tropicana advantages in advertising and distribution which will entrench it as the market leader. There is no substantial evidence in the record that Beatrice brought to Tropicana a significant competitive advantage in advertising. Although Beatrice is a large advertiser (finding [66] 280), there was no proof of advertising efficiencies not available to other firms in the retail COJ market. *Hublein,* at p. 21,949–50.

I find, however, that the acquisition did confer on Tropicana advantages in distribution which will lead to greater expansion of Tropicana's sales of COJ to the retail market in areas of the country where shipping costs have prevented it from domination, and will undoubtedly increase the already high concentration in the market.

Tropicana has been the leader in the retail COJ market for many years and now has over 30% of an increasingly concentrated market. (findings 122, 123; CX 560Z–18) Tropicana is the price leader in selling COJ and in making pricing decisions Tropicana considers only its own costs rather than prices charged by its competitors. (finding 153)[24] Tropicana's only obvious marketing disability before the merger involved difficulty in selling to markets far from Florida because of increased freight rates incurred in shipping COJ to those markets. (finding 293) This deficit should be alleviated by the merger.

Before the merger, Tropicana was interested in expanding its sales of COJ to food stores in California and other areas in the west and midwest. (finding 300) Tropicana could have done this by shipping bulk COJ to dairies in those areas, which would process it and distribute it under a different label. (finding 301) It was likely, but for the merger, that Tropicana would have a plant reconstituting COJ in

[24] This aversion to price competition in selling COJ to grocery stores is coupled with an aversion to price competition by grocery stores in selling COJ. In 1978, Mr. Barnebey, the president of Tropicana, wrote to a dairy customer who had complained about a chain store selling Tropicana COJ as a loss leader. Decrying this price competition, Mr. Barnebey said that "Because Tropicana represents such a large portion of the total chilled juice sales, we have tried to maintain the most orderly market possible." Mr. Barnebey related in the letter how Tropicana, in order to avoid such retail price competition, had resisted direct sales to grocery warehouses for several years after Kraft had started the practice. (CX 802A)

California in the next ten years. (finding 302)[25]

The merger solved this problem for Tropicana. Beatrice [67] already has milk plants in San Jose, California (finding 191) and throughout the west and midwest. (RX 1750, RX 1752) Tropicana now has the ability to lower its costs in California, as well as the other markets now serviced by Beatrice dairy plants.

The merger has entrenched Tropicana as the market leader in the processing, distribution and sale of COJ to grocery stores.

CONCLUSION

Beatrice violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act,[26] by acquiring Tropicana, because the effect of the acquisition may be to substantially lessen competition in the processing, distribution and sale of COJ to retail food stores in the United States.

RELIEF

Only complete divestiture can return Tropicana to a position as an independent competitor in this concentrated market. *United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326–31 (1961). In addition, a 10 year ban on future acquisitions is now customary when Section 7 is violated. *Kaiser Aluminum & Chemical Corp.,* [1976–79 Transfer Binder] Trade Reg. Rep. ¶ 21,578 at p. 21,697 (appeal pending).

Complaint counsel argue that Beatrice should be required to divest Tropicana through a public stock offering or by a pro rata distribution of stock to Beatrice shareholders, and not by a sale to another corporation. The basis of their proposal is that, because of the size of Tropicana, only a large corporation could buy it and the "deep pocket" thus afforded would further entrench Tropicana as the market leader in the COJ market. I have found, however, that Tropicana has been entrenched by the merger because of the enhancement of its processing and marketing of reconstituted COJ through the Beatrice milk plants, not because of a deep pocket theory. While it may be desirable to have an independent market leader [68] which is not affiliated with any conglomerate corporation, an equally forcible argument can be made that ownership by a large, well-financed non-dairy company may be a more realistic way to have Tropicana battle competitors such as The Coca-Cola Company, Kraft, and, hopefully, Beatrice. *Ligget & Meyers, Inc.,* 87 F.T.C. 1074, 1141, *aff'd, Ligget & Meyers, Inc.* v. *Federal Trade Commission,* 567 F.2d 1273 (4th Cir. 1977)

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[25] Much of Tropicana's COJ is already processed by reconstituting bulk concentrate. (finding 65)

[26] No separate proof or argument was made under the Section 5 count but any violation of Section 7 is a violation of Section 5. *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. 316, 321–22 (1966)

I also believe that Beatrice should divest the profits made by Tropicana during the illegal tenure. The notice order attached to the complaint in this case, in paragraph 2, stated that, should the Commission conclude that there had been a violation of law, it might order ". . . divestiture by Beatrice of Tropicana and of any profits derived therefrom so as to create a viable, independent entity engaged in the processing, distribution and sale of ready to serve orange juice." While that language appears to include divestiture of profits as part of divestiture of Tropicana, it certainly put the respondents on notice that the profits made by Tropicana during Beatrice's ownership of the company might be divested. Divesting the profits of Tropicana would merely raise the price to be received by Beatrice from the sale of Tropicana,[27] and I believe they should be divested separately, to the United States Treasury. The purpose of this divestiture of profits is not only to avoid unjust enrichment but "to prevent illegal practices in the future," *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952), by avoiding a continuing violation of Section 7 by the possible use of the profits obtained through the illegal acquisition to further restrain trade even after Tropicana is divested. The Commission has the authority to compel such affirmative acts of compliance. *Ecko Products Co., supra,* 65 F.T.C. at pp. 1212–16.[28] **[69]**

Order

I.

It is ordered, That Respondent Beatrice Foods Co. (hereinafter "Beatrice") shall:

A. Within one (1) year from the date on which this order becomes final, divest all its interest in the assets and business of Tropicana Products, Inc. (hereinafter "Tropicana") which Beatrice acquired in August 1978, together with all additions and improvements.

B. Within three (3) months from the date on which this Order becomes final, submit to the Federal Trade Commission for its approval, the plan of divestiture referred to in paragraph A of this part, and make such changes in the plan and submit such additional information with respect to it as the Commission may require. The plan shall be designed to reconstitute Tropicana with all its pre-acquisition assets and business (and any new business in which it has engaged subsequent to the new acquisition) as a viable, independent, corporate and competitive entity, and shall include divestiture to the United

[27] *Ligget & Meyers, Inc., supra,* at p. 1141.

[28] This provision is not meant to punish Beatrice. *Cf. United States* v. *Papercraft Corp.,* 393 F.Supp. 415, 425–26 (W.D.Pa. 1975)

States Treasury of all of the profits made by Tropicana while that company was owned by Beatrice.

II.

It is further ordered, That following the divestiture of Tropicana required by Part I of this Order, no employee, officer **[70]** or director of Beatrice shall at the same time be an employee, officer or director of Tropicana.

III.

It is further ordered, That pending divestiture as required by Part I of this Order, Beatrice shall cause Tropicana's business to be conducted in the normal manner; no plans for expansion or improvement of its plants or business shall be halted or interrupted; and Beatrice shall not permit any changes in Tropicana's business, corporate or financial structure, or otherwise, which would impair Tropicana's volume of business, profitability or ability to survive following divestiture.

IV.

It is further ordered, That for a period of ten (10) years from the date this Order becomes final, Beatrice shall not acquire, or acquire and thereafter hold, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any business, corporate or noncorporate, engaged in processing, distributing, and selling ready to serve orange juice. **[71]**

V.

It is further ordered, That on the first anniversary date of the effective date of this Order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph IV of this Order, Beatrice shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge made by Beatrice; the date of each such acquisition, merger or agreement; the products involved and such additional information as may from time to time be required.

VI.

It is further ordered, That for ten (10) years following the divestiture required by Part I of this Order, Tropicana shall not agree to merge with or be acquired by any individual, partnership or corporation without the prior approval of the Federal Trade Commission; and neither the officers nor the directors of Tropicana shall recommend the merger or acquisition of Tropicana to Tropicana's shareholders without such prior approval.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The question before the Commission is whether the 1978 acquisition by Beatrice Foods Co. (Beatrice) of Tropicana Products, Inc. (Tropicana) violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint, issued on June 20, 1978 following denial of an application for a preliminary injunction against the proposed merger, *FTC v. Beatrice Foods Co. and Tropicana Products, Inc.,* 587 F.2d 1225 (1978), alleged that the effects of the merger may be to substantially lessen competition or tend to create a monopoly in the processing, distribution and sale of ready-to-serve orange juice in the United States.

The complaint alleged that the acquisition eliminated actual competition between Beatrice and Tropicana and between competitors generally, and that it might foster other mergers [2] between competitors, causing a further loss of competition in the processing, distribution and sale of ready-to-serve orange juice. The complaint further charged that the previously existing level of concentration in the relevant market will be increased, and the possibilities for eventual deconcentration decreased, as a result of the acquisition. The administrative law judge (ALJ) found the acquisition unlawful based on a horizontal theory of violation. In addition, stating that future effects must also be assessed in a horizontal merger case, he found the acquisition unlawful based on the "conglomerate" theories that it eliminated significant potential competition by Beatrice in the relevant market and entrenched Tropicana as the market leader. The ALJ ordered Beatrice to divest itself completely both of Tropicana and of the profits made by Tropicana during the time it was owned by Beatrice.

We disagree with the ALJ's conclusion that the acquisition violates the antitrust laws and order that the complaint be dismissed. We find the loss of actual competition resulting from the merger to be too little

to establish a violation of Section 7. We find the loss of potential competition not to have been pled in the complaint, and therefore we are constrained from reaching the merits of that allegation. Were we able to decide that question, however, we would be unlikely to find a substantial loss of potential competition resulting from the acquisition. Finally, we find that the proof of entrenchment of Tropicana is insufficient to warrant dissolution of the merger on that theory of violation. [3]

I. THE MERGING FIRMS AND THE INDUSTRY

Beatrice is the nation's leading diversified food manufacturer, producing and selling to consumers more than 8,000 products, I.D.F. 2, including over 4,000 dairy and grocery products. I.D.F. 3.[1] In fiscal 1978, Beatrice had total net sales of $6,313,880,000, making it the 31st largest industrial corporation in America in net sales. I.D.F. 2. In the same year, Beatrice was the nation's third largest dairy and the largest milk producer and distributor, with 37 milk plants serving 35 states. I.D.F. 5; I.D. 54. In conjunction with its milk business, Beatrice sold ready-to-serve chilled orange juice (COJ) to grocery stores and institutional customers, such as hospitals and restaurants. [4] I.D.F. 6.[2] Using its dairy plants, Beatrice reconstituted COJ from bulk concentrate, I.D.F. 158, and also distributed COJ processed by other orange juice producers. I.D.F. 159. In comparison to many other of its product lines, Beatrice's sales of its COJ products were a small part of its business prior to the merger, generating only $2.4 million in fiscal 1978 on the total sale of 1.2 million gallons of COJ. I.D.F. 210–12. Although its actual ranking was unknown, Beatrice had a tiny fraction of the relevant market, but had been increasing its production and sale of ready-to-serve orange juice in the years just before the merger. I.D. 54.

Tropicana, the acquired firm, is a major processor and distributor of orange juice products, and the leading processor of COJ in the

[1] The following abbreviations will be used:

I.D.F.	–	Initial Decision Finding of Fact No.
I.D.	–	Initial Decision Page No.
Tr.	–	Transcript of Testimony Page No.
CX	–	Complaint Counsel's Exhibit No.
RX	–	Respondent's Exhibit No.
CPF	–	Complaint Counsel's Proposed Finding of Fact No.
RPF	–	Respondent's Proposed Finding of Fact No.
CR	–	Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
RR	–	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
CAB	–	Complaint Counsel's Appeal Brief Page No.
TAB	–	Tropicana's Appeal Brief Page No.
BAB	–	Beatrice's Appeal Brief Page No.
TRB	–	Tropicana's Reply Appeal Brief Page No.
BRB	–	Beatrice's Reply Appeal Brief Page No.

[2] For precise definitions of chilled orange juice and other technical terms that will be used herein, such as bulk concentrate, processed and reconstituted COJ, and frozen concentrate orange juice (FCOJ), *see* I.D. at 5–6.

United States. I.D.F. 9. In 1977, Tropicana had total net sales for all its products of $244,583,000. I.D.F. 10. In fiscal 1978 it sold 106,821,-648 gallons of COJ for $206,649,295. I.D.F. 11.

Approximately 90 percent of the oranges used in producing various orange juice products in the United States comes from Florida, the rest coming from the Southwest, Mexico, and Brazil. I.D.F. 127; CX 1650, pp. 12–13. Processors like Tropicana either turn the oranges directly into COJ, frozen concentrate orange juice ("FCOJ"), bulk concentrate (frozen juice in bulk form, which is the **[5]** raw material for reconstituted COJ), or canned single strength orange juice ("CSSOJ"). I.D.F. 22.

The chain of production and sale in this industry includes the citrus growers who supply the oranges; the processors, such as Tropicana, who own or buy the oranges directly from the growers and process them for use in various forms;[3] firms (usually dairies), such as Beatrice, who purchase "bulk concentrate" and "reconstitute" it into orange juice by adding water to it, much as a person adds water to FCOJ; wholesale distributors, who include the (1) processors who sell their product directly to the retail or institutional customer, (2) the dairies, who in addition to reconstituting orange juice from bulk concentrate, resell juice already processed into COJ, which is supplied to them by the processors, and (3) others such as independent warehouses and food brokers; and the end-line industry customers, the grocery stores and institutions, who sell the orange juice to consumers. Processors, like Tropicana, Minute Maid, and Kraft, usually distribute their product directly to central retail warehouses and institutions, and less frequently through independent distributors such as the dairies. Dairies which sell orange juice, such as Beatrice, typically distribute their product directly to the grocery or institution. **[6]**

There is incomplete vertical integration in the industry, in that processors own little citrus acreage themselves[4] and do not own any retail outlets. However, processors like Tropicana, Minute Maid and Kraft, who have direct access to oranges and the facilities for turning them into orange juice products, are more vertically integrated than dairy reconstituters of COJ, who are dependent on producers of bulk concentrate for supply.

In sales of COJ to the retail segment of the market, shelf space is the prize, and there is intensive competition for it.[5] To win shelf space, suppliers of orange juice must convince store owners that their brands

[3] For the most part, they obtain supply from the growers.

[4] In 1977, Tropicana owned 690 acres of citrus groves, which it used primarily for experimental purposes, CX527G; it purchased nearly all of its supply of oranges from independent growers. CX527F.

[5] Grocery stores usually carry about five brands, including major brands such as Tropicana or Minute Maid and a few regional or private label products. I.D.F. 140.

will sell. To do that, they must offer a competitive price or cultivate consumer loyalty to their brands, relying heavily on consumer advertising and promotion. I.D.F. 136–139. Tropicana and the other leading firms engage in substantial brand advertising to consumers. I.D.F. 12, 136–37; I.D. 55. Beatrice was not a strong advertiser in the COJ market prior to the merger, but it is a very large advertiser generally, ranking 17th in the nation in 1978 among all industrial corporations. I.D.F. 4.

Beatrice acquired Tropicana at a time of significant and sustained growth in the orange juice market. Historically, frozen orange juice (FCOJ) has been, and remains, the leading orange juice [7] product, but COJ has made rapid gains in the last several years. From 1975 to 1979, FCOJ dropped from 77 percent in 1975 to 68%, while COJ climbed from 18 to 28 percent at an annual growth rate of 20%, twice that of FCOJ. I.D.F. 57. Although COJ costs more than FCOJ, it is easier to use, apparently a major reason for its growing popularity with consumers. I.D. 55. The recent growth of the COJ segment of the market has attracted, and been assisted by, new entry, most notably that of Minute Maid. *Id.*[6] Prior to Minute Maid's entry, Tropicana and Kraft had been the only two COJ firms who sold COJ throughout most of the country. Minute Maid has provided significant competition to these two leading firms, as well as to smaller local and regional rivals. Still, despite this growth and new entry, the ALJ found the level of concentration and loss of competition from the merger substantial enough to warrant a finding that the merger violated Section 7. We will address the question of concentration and the other relevant antitrust considerations of the merger in the discussion that follows.

II. THE RELEVANT PRODUCT MARKET

The market definition questions in this case are complicated. Concerning the product market, the complaint alleges that a relevant line of commerce in which to assess the legality of the merger is "the processing, distribution and sale of ready-to-serve orange juice," Paragraph 10. The ALJ held that the evidence "overwhelmingly shows" a separate line of commerce for COJ [8] sold to the retail market, I.D. 56, justifying the exclusion of orange juice sales to institutions from consideration in assessing the competitive impact of the merger. I.D.F. 29–40. We agree with the ALJ's determination to exclude institutional sales, and note that respondents have not seriously challenged it on appeal.[7]

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[6] Minute Maid entered the COJ business from its position as the leading processor of FCOJ. It owns a bulk concentrate processing plant in Florida, which supplies seven regional reconstituting plants located throughout the country.

[7] Respondent Tropicana did challenge the factual basis of IDF 39 concerning a lack of cross-elasticity of demand between the retail and institutional markets, TAB 32, but it did not question the fundamental soundness of the

(footnote cont'd)

A. *The Relevant Products*

The ALJ found, as the complaint alleged, that COJ sold to retail is a separate relevant product market, distinguishable from the sale of FCOJ and CSSOJ. The ALJ made his determination on the basis of the criteria for product market definition enunciated in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962). Specifically, he cited evidence that COJ is recognized as a separate market by industry and consumers, that it is ready to serve whereas FCOJ must be prepared, that it is far superior in quality to CSSOJ, and that it has distinct prices, customers, and facilities for production, distribution, and in-store display. I.D. 56–57. He stressed that it is not essential to satisfy all of the *Brown Shoe* criteria in order to establish a relevant submarket. *Brown Shoe,* 370 U.S. at 326, *United States v. Aluminum Co. of America ("Alcoa-Rome"),* 377 U.S. 271, 276–277 (1964).

On appeal respondents do not question the ALJ's findings on industry and public recognition of a separate COJ market or on the peculiar usage characteristics and quality of COJ. They argue, [9] however, that there is sufficient price interaction and cross-elasticity of demand between COJ and FCOJ to warrant a finding that they belong in the same relevant product market. Respondents are correct to identify cross-elasticity of demand as the most important factor in product market definition. *See* FTC Statement Concerning Horizontal Mergers at 12 and the revised Department of Justice Merger Guidelines at ¶II(A), both issued on June 14, 1982.[8] However, respondents' contentions about price elasticity are not borne out by the evidence.

Industry representatives, including a Tropicana official, testified that promotional sales of FCOJ do not perceptibly influence the sale of COJ in the retail market. I.D.F. 58. Further industry testimony indicated that sellers of COJ to retail customers pay no attention to the prices of FCOJ and CCSOJ in setting their own COJ prices. I.D.F. 47. In addition, a national statistical study of price and consumer purchasing patterns for orange juice products between 1972 and 1979 concluded that there are no statistically significant substitutes for COJ, including FCOJ and CCSOJ, and that consumer demand for COJ is relatively price inelastic.[9] Dr. Tilley attributed his findings of price [10] inelasticity for COJ to the peculiar characteristic of COJ buyers to get into the "habit" of drinking COJ; unlike FCOJ, he observed that many consumers will develop a stable attachment to COJ and contin-

ALJ's finding of a separate market of COJ sales to the retail segment. Respondent Beatrice's appeal briefs did not address this issue at all.

[8] Cross-elasticity of supply represents another important factor, as the FTC Statement and the DOJ Guidelines also recognize. Respondents alleged below that there was cross-elasticity of supply between COJ and FCOJ which also justified inclusion of both in one market. However, respondents did not make this argument on appeal.

[9] CX 514 B,D,I,J,P,R; Tr. 2236–37, 2243, 2397. The study was done by Dr. Daniel Tilley, then a research economist with the Florida Department of Citrus and an adjunct professor at the University of Florida.

ue to buy it regardless of price fluctuations in COJ and the availability of interchangeable products such as FCOJ. Tr. 2241, 2243.[10] Under cross-examination, Dr. Tilley conceded there is some price sensitivity between COJ and FCOJ, Tr. 2383–84, but read in the context of the study itself and his entire testimony, this statement does not undercut his basic thesis that the cross-elasticity of demand between the two products is low.[11] Beyond reference to this thread of testimony, TAB 33–34, respondents have not attacked the validity of Dr. Tilley's statistical findings, nor provided any other reason why we should not give them substantial weight.

Respondents complain that the Initial Decision relies on the Tilley study while completely overlooking two studies of the New York City market which, they claim, provide significant evidence of substantial switching or substitution of COJ and FCOJ. RX 1, 1P; TAB 33. We believe, however, that these studies of a single local market, an area which is nowhere suggested to be representative of [11] the COJ market as a whole, are substantially less probative on the question of cross-elasticity of demand than the national Tilley study and industry testimony on COJ pricing practices already cited.[12]

Respondents argue that if the COJ market is going to include COJ sold in both cartons and glass containers, as the ALJ says it should, I.D.F. 71–76, then it logically must include FCOJ too, since FCOJ and carton COJ are closer together in price than are carton and glass COJ. TAB 24–25; CX 560T (*in camera*). Alternatively they argue that if FCOJ is excluded, then a separate submarket must be found for COJ sold in glass, because of its higher price. TAB 25.[13] These arguments place too much weight on absolute price differences as opposed to price *elasticities* that, under the FTC Merger Statement and DOJ Merger Guidelines, should bear most decisively on the inclusion or exclusion of various types or packages of orange juice products in the relevant product market. Despite a price spread between COJ and FCOJ that is narrower than that between glass and carton COJ, evidence of other distinguishing factors, particularly a relatively low [12] cross-elasticity of demand, warrants a market division between these two products. Further, despite the greater price disparity be-

[10] He admitted, however, that his study did not consider the possibility that a regular buyer of COJ might occasionally buy FCOJ when it is on sale, and then resume the habit of buying COJ. Tr. 2391. Even so, allowing for this possibility does not necessarily refute Dr. Tilley's general findings of a "purchase-habit response" and substantial price insensitivity on the part of COJ buyers.

[11] Moreover, due to the nature of the data base used, the study may have tended to overstate the degree of any price sensitivity and cross-elasticity of demand. CPF 127, citing Tr. 2094–96.

[12] Obviously FCOJ and, perhaps, even CCSOJ, are to some extent interchangeable with COJ in the sense that their end use is the same and their price ranges, while substantially below those of COJ, are not dramatically so. It would be surprising if there were no interchangeability at all among such closely-related types of products as these. But it is not at all inconsistent to say that products can be somewhat interchangeable but, in light of prevailing commercial attitudes and realities, that their division into separate markets will provide a more useful starting point for antitrust analysis. *See, e.g.*, Sullivan, *Handbook of the Law of Antitrust* 607–08 (1977).

[13] Such a finding would exclude Beatrice from the relevant product market, since it sold little if any COJ in glass.

tween glass and carton containers of COJ, and other alleged differences in quality and handling between these forms of packaging, RPF 22–28, the record indicates both that the industry recognizes them as being in the same market, and that there is a close competitive relationship between them, in which COJ producers typically consider the price of all types of containers in pricing their own products. I.D.F. 71–73, 75; Tr. 711, 759–60, 963, 970–71, 1480–81, 1492. The existence of such price sensitivity is persuasive evidence that carton and glass COJ belong in the same product market.

Respondent Tropicana relies on *Alcoa-Rome* and *A.G. Spaulding & Bros. v. FTC,* 301 F.2d 585 (3d Cir. 1962) in contending that price disparity between glass and carton COJ is a sufficient basis for placing them in separate submarkets here. In *Alcoa-Rome,* however, the prices of insulated aluminum and copper conductors did not respond to each another, and the price difference of 50 to 65 percent[14] was the "single most important factor," overriding other clear aspects of competitive overlap which, ordinarily, would have been enough to place the products in the same market. 377 U.S. at 275–276. The evidence here, which shows price and promotional interaction between sales of COJ in glass and carton [13] containers, clearly distinguishes this case from the facts in *Alcoa-Rome.*[15]

A.G. Spaulding & Bros. also is unpersuasive authority for respondent Tropicana's position. There the court grouped several different types of athletic equipment into a single market. The very same factors that justify a separate COJ market in this case, *e.g.,* industry recognition and a regular competitive relationship between products, justified the finding of an all-inclusive industry market in that case. The court did find distinct product classes within that broad market divided into high and low-price categories of athletic goods, but it did so on the basis of evidence showing that there were high and low-price groupings of customers. In this case there is little evidence that price stands out as the *determinative* factor in the selection of either a certain type of orange juice or type of orange juice container.

In short, applying principles of cross-elasticity of demand recognized by the Commission and the Justice Department as a central consideration in product market definition, we find no internal contradiction between the inclusion of glass-packed COJ in [14] the rele-

[14] This is substantially greater than the 20 to 50% difference between glass and carton COJ alleged here. TAB 34. Complaint counsel have argued that this allegation overstates the actual price difference. CR 26–27.

[15] On the average, carton-packed COJ undoubtedly does have a price advantage over glass-packed COJ and appears to be the trend in the industry, largely for that reason. Nevertheless, sellers of COJ in glass, most notably Tropicana and to a lesser extent Kraft, have competed effectively in this package form on the basis of a premium image, superior quality and shelf life, promotional advantages, and brand identification. Tropicana and other sellers of COJ in glass are thus far better off than the fabricators of insulated copper conductor in *Alcoa-Rome* who were competitively crippled by their price disadvantage. 377 U.S. at 276.

vant product market and the exclusion of FCOJ from that market.[16]

Of course, any attempt to define a single relevant market will involve some measure of arbitrary line-drawing. Market definition is only the start of the analysis, and the definition of a "relevant market" should not preclude consideration of any competitive pressures provided by products outside that definition. See the FTC Merger Statement at 5–6, and the DOJ Merger Guidelines at ¶III(c)(1)(b). Nor, if a broad market is selected, are we precluded from recognizing that the products within that broad market may be something less than perfect substitutes. In this case, a fair reading of the evidence is that competing producers of FCOJ may well have some impact on the price and production of COJ, though clearly not as much impact as do the actual producers of COJ.

As long as these effects are properly recognized, the question of market definition takes on less importance. We recognize that there are arguments for taking these effects into account by defining a broad product market and using the resulting smaller market share figures (as Commissioner Douglas urges in his concurring opinion). We are more inclined to take them into account by using the narrower, COJ market figures, but considering the presence of FCOJ producers in evaluating the significance of those [15] shares. However, given the result we reach it is unnecessary to resolve this issue here. As we discuss below, even using the narrower market definition we do not find this acquisition likely to be anticompetitive.

B. *The Relevant Level of Distribution*

As previously noted, the complaint alleges that a relevant line of commerce in this matter is the processing, distribution and sale of COJ. The ALJ found that the relevant market is the processing, distribution and sale of COJ to retail food stores.[17] He essentially defined this market to include processed, reconstituted, and relabeled COJ distributed directly or indirectly to the retail level by the owner of the COJ brand label.[18] I.D.F. 210–218. This definition groups together processors, reconstituters, and private relabelers as horizontal competitors to the extent they all sell their own brands of COJ to the retail level.[19] It derives from the nature of the evidence in the record, which

[16] The ALJ found that respondents' contention below that fresh and reconstituted COJ were separate submarkets was also unconvincing. I.D.F. 63–70. We agree with these findings, and note that respondents have given short shrift to this issue on appeal.

[17] This finding is premised, of course, on his prior finding that sales of COJ to the retail level are a segregable market.

[18] As noted, Tropicana, like other processors, sells most of its own brand of processed COJ directly to retailers, and the rest to retail through distributors. Beatrice sells its own brand of reconstituted and relabeled COJ to retail, in addition to distributing pre-processed COJ under the processor's label. I.D.F. 159.

[19] Processors, as previously discussed, make COJ and/or bulk concentrate straight from the oranges. Reconstituters, such as dairies, use their milk production plants to make their own COJ from bulk concentrate bought from a processor. Private relabelers, often dairies as well, buy ready-to-serve COJ from a processor and resell it to retail outlets under their own brand label.

centers on brand sales to retail, I.D. 57, and from [16] evidence that competition for shelf space and sales to consumers are primarily based on brand promotion. If this market definition is accepted, it would necessarily include all direct and indirect COJ sales to retail by Tropicana under the Tropicana label, and all COJ sales to retail by Beatrice under Beatrice-owned labels,[20] whether or not the Beatrice product was bulk concentrate reconstituted into COJ by Beatrice or pre-processed COJ bought from a processor and resold by Beatrice under its label.[21] This [17] definition seems basically to comport with complaint counsel's view of the relevant line of commerce.

Respondent Tropicana contends that this line of commerce is overly broad, arguing that reconstituters and relabelers like Beatrice do not belong in a market with processors because they are functionally different from processors and operate at an entirely different level, namely, distribution. TAB 12–17. It asserts they are not true competitors because reconstituters and relabelers lack the same control over supply and play no part, as do processors, in the conversion of oranges into COJ and bulk concentrate. TAB 16. It further argues that no competitively meaningful distinction can be made among dairy sales of reconstituted COJ, relabeled COJ, and COJ distributed by dairies under a processor's label. For these reasons, respondent Tropicana concludes that dairies are not in competition with processors because they act essentially as distributors, even when they reconstitute or relabel the product. TAB 16.

We find this argument unconvincing. In contending that processors and dairies which reconstitute or relabel their own brand of COJ are not horizontal competitors, it is too little to say that processors enjoy an advantage over dairies in their access to orange supply. This would prove only the existence of unequal degrees of access or vertical integration, not the non-existence of competition between such entities at a mid-level between processing [18] and pure distribution. Conse-

[20] The main Beatrice label was Meadow Gold; others were Sanitary Dairy and Dixie Sunshine. I.D.F. 158.

[21] The Initial Decision is somewhat ambiguous on this definition, however. While it contains findings on the sales volume and market share of all COJ sold by Beatrice to retail under a Beatrice label, whether reconstituted or relabeled, I.D.F. 212–213, and gives great weight in its potential competition analysis to Beatrice's Dixie Sunshine Project, which originated as a private relabeling program, I.D.F. 236–52, I.D. 65, *see* discussion at pp. 59–60, infra, the Beatrice market share it refers to in discussing the competitive effects of the merger represents only the amount of COJ reconstituted by Beatrice. The difference between these two market shares, however, is only 0.2% (0.57% versus 0.35%). We adopt the 0.57% figure.

Neither side nor the ALJ has said that the mere distribution of COJ is in and of itself a relevant line of commerce. This level would include COJ distributed to retail without regard to brand ownership; for example, Beatrice's share of the distribution market would include COJ which it sold to retail under the Tropicana and other processors' labels, while Tropicana's share would include that portion of its COJ products which it distributed itself directly to retail, *e.g.*, the vast percentage of its total sales. Hundreds of dairies compete with each other as distributors of COJ processed and labeled by others, and Beatrice and Tropicana occasionally competed directly as wholesale distributors of Tropicana-labeled juice. Nevertheless, while the distribution level theoretically could be a relevant line of commerce, neither the complaint nor the parties focused on it, and, not surprisingly, the record contains no evidence of concentration ratios, market shares, or possible competitive effects from the acquisition at this level. Further, given the ease of entry and multitude of firms operating as distributors in this industry, it is extremely doubtful that the merger could have had any significant anticompetitive effects at this level.

quently, this assertion is legally significant only insofar as it raises the possibility that access to supply may be a barrier to entry into the processing or reconstituting of COJ, and does not lead to the conclusion that processors do not compete with reconstituters. Furthermore, respondent Tropicana's argument fails to recognize the fact that processors regard many dairies which reconstitute COJ, such as Johanna Farms, Home Juice, Ohio Pure Foods, Sealed Sweet, and Vita Pak, to be competitors in the production and sale of COJ. I.D.F. 87–92.[22]

In addition, respondents' argument overlooks evidence of commercial realities in the COJ industry which lend support to a finding that processors, reconstituters, and relabelers of COJ sold to retail may be appropriately grouped in a single product market. It is true, as they contend, that dairies which distribute COJ supplied to them by processors are customers of those processors and in that sense are not in a horizontal relationship [19] with them. RPF 102–03.[23] Both complaint counsel and the ALJ recognize this reality. CR 44; I.D.F. 159. Indeed, until recently at least, the role of the dairies in the COJ industry traditionally had been as distributors of processors' brands of COJ as an adjunct to their regular dairy lines. The existence of a vertical relationship between a processor and dairy does not mean, however, that they do not become competitors when the dairy assumes COJ reconstituting or relabeling functions. In this respect, we believe the central question is whether the transformation of dairy distributors into reconstituters or relabelers of COJ sold by them under their own brand names has independent economic significance and places them in a horizontal competitive relationship with processors in the sale of COJ to the retail market.

Despite important functional differences between processors and dairies in the COJ market, which may serve to operate as significant barriers to large-scale COJ production by dairies, there is substantial evidence in the record to indicate that dairies, such as Beatrice, can operate as independent competitive forces in the sale of their own brand of COJ to the retail market. In the first place, they have the capacity, as reconstituters, to generate and add to the production of COJ that [20] is made available to the retail market.[24] They obtain

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[22] Moreover, it appears that Kraft, regarded by Tropicana and others as one of the three leading processors of COJ, actually operates as a relabeler in a small percentage of its sales to the retail market. Kraft has a co-packing agreement with Sunkist for about 10% of its product, under which Sunkist *processes* and packages the juice for Kraft, and Kraft then distributes it under its own label. I.D.F. 112. Respondents never explain why these relabeled product sales by Kraft are considered to be in the relevant line of commerce, but not all other brands of reconstituted or relabeled COJ products sold to the retail market.

[23] It should be noted that there are no vertical allegations in the complaint arising from this seller-buyer relationship.

[24] Indeed, the ALJ found that increased reconstituting by dairies has been an important contributor to the rapid growth of COJ production in recent years. I.D.F. 253. One dairy, Hood, which reconstitutes COJ from bulk concentrate, is the fourth largest producer of COJ in the country. In addition, several other dairies which make reconstituted COJ are recognized as significant competitors to processors and others in the sale of COJ to retail customers. While adequate supply of concentrate may not always be assured, it is significant to note that there

(footnote cont'd)

bulk concentrate, which they reconstitute into COJ, from suppliers who are not necessarily also processors of COJ; in fact, the leading processors of COJ, Tropicana and Minute Maid, sell no bulk concentrate at all to dairies. Processors such as Tropicana and Minute Maid thus are in no position to restrict the output of bulk concentrate needed by dairy reconstituters. In view of these factors, and despite other possible limitations on the extent of their ability to reconstitute COJ, such as inadequacies in plant capacity, supply, and marketing resources, dairies can be the practical equivalent of processors in terms of the production of COJ for sale to the retail market.

Second, brands of COJ reconstituted or relabeled by dairies tend to represent a lower-price alternative to the more established national brands sold under the Tropicana, Minute Maid, and Kraft [21] labels. I.D. 55; I.D.F. 217, 257, 298.[25] Indeed, as even respondents recognize, dairies commonly cease distributing COJ under the processor's more expensive label, and make the relatively easy switch to reconstituting or relabeling their own product, when it is necessary for them to offer more competitive prices or promotional allowances to retailers in order to get shelf space. TAB 12. Price thus works both as a variable which helps to determine whether a relationship between a processor and a dairy is going to be vertical or horizontal, and as a means of creating competition between processor and dairy-owned brands for shelf space. Competition for shelf space, based on significant price variations among brands owned by processors and dairies, can result in a greater range of prices, and price-savings, for consumers. We believe this fact alone confers a degree of economic significance in the COJ market to the reconstituting and relabeling activities of dairies.

Third, dairies which produce and sell their own brands market and advertise them to retail customers and consumers in the same manner—if not to the same degree—that processors promote the [22] brands they sell.[26] They are typically wholly responsible for the promotion of their brands, deriving little if any marketing assistance from their suppliers of bulk concentrate or processed COJ. CX 593, p.

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are numerous suppliers of bulk concentrate (40 in Florida), I.D.F. 141, such that dairies are not dependent on the major COJ processors for bulk concentrate supplies. Respondents argue that they are in horizontal competition with suppliers of bulk concentrate to these dairies, but not with the dairies themselves when they sell COJ to the retail market. While such horizontal competition between processors and bulk concentrate suppliers for dairy customer orange juice accounts obviously exists, it does not follow that there cannot be horizontal competition between processors and dairies at a lower level in the distribution chain, namely, the sale of COJ to retail establishments.

[25] Respondent Tropicana argues that dairy distribution of juice sold under another processor's label cannot be distinguished from sales of COJ reconstituted or relabeled by dairies under their own label. TAB 15–16. To the contrary, the lower price at which dairies can sell reconstituted or relabeled juice, and their substantially greater involvement in the promotion of their own brand products, represent significant competitive distinctions from juice which they merely distribute for another firm, under that firm's label.

[26] Again, this is in marked contrast to the more passive promotional role dairies play when they merely distribute juice bought from and sold under another company's label. In the latter case, they typically have little responsibility for or direct investment in the marketing and advertising of the brands distributed, those being primarily the functions of the processor which owns the brand.

117–18, 340–41. Through in-trade promotions and consumer advertising designed to gain consumer recognition and build consumer demand for their brands, they compete with processors for shelf space. CX 663A. Insofar as dairies produce, package, price, market, and advertise their own brands of COJ, and thereby expand the universe of products available to grocery outlets and consumers, they provide competition and operate on the same plane as processors in the sale of COJ to retail. The fact that they are less vertically integrated than processors—one step removed from the point of supply and original manufacture of COJ and bulk concentrate—is of little consequence in defining the relevant line of commerce under the terms of the complaint, and does not negate the commercial reality of their horizontal relationship to processors and others in the sale of COJ. Attempts to draw bright lines between firms engaged in the processing of COJ on the one hand, and the reconstituting and relabeling of COJ on the other, cannot obscure the fact that those lines are blurred in reality, and that the battle for retail shelf space among **[23]** processors and dairies which own brands is a relevant area of competition in the COJ industry.

In view of the above, it is not surprising that the evidence overwhelmingly indicates that processors, including Tropicana, see dairies as competitors when they engage in the reconstituting of COJ for sale to retail under their own brand names. I.D.F. 87–92, 219; CPF 181–88, 369; CX 593, p. 348; CX 527Z–10; CX 620, p. 34–35, 90, 96; CX 661A; CX 661D; CX 662D; CX 892B; CX 953; Tr. 764–65, 786, 1058, 1065, 2906, 2922–23, 2983–84.[27] Dairies which fall into this group are the large regional reconstitutors, such as Hood and Home Juice, and assorted smaller reconstituters, such as Beatrice.[28] Given the prevailing industry recognition that processors and reconstituters do compete for sales to retail outlets, respondents' argument that they do *not* compete because they tend to use different delivery methods is overstated and not **[24]** persuasive.[29] Where processors and dairies are selling their products in the same geographic region, they are competing, and see themselves as competing, for the retail shelf space regardless of the method of delivery they use. CPF 183.[30]

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[27] *But see,* Tr. 4892 (Beatrice witness testified that Beatrice competes not with Tropicana, but with dairies that buy and distribute Tropicana).

[28] It is less certain that processors view dairies as competitors in the sale of COJ to retail when they relabel COJ bought from a processor; Tropicana does appear to consider such relabeled juice to be competition at the retail level, however. *See, e.g.,* CX 593, p. 348.

[29] The major processors typically distribute to independent and chain warehouse buyers, or individual chain stores, while dairies tend to deliver COJ straight to the grocery door. I.D.F. 77–84. Processors and dairies do utilize both types of delivery, however. I.D.F. 77, 79–82, 84–85, 222–223, 258, and the recent trend of dairies has been to make warehouse rather than direct, "store-door" delivery. I.D.F. 78–81, 272–273, 292. Greater distributional and cost efficiencies can be achieved through delivery to central warehouse locations. I.D.F. 270.

[30] Indeed, brands of dairies delivered store-door have displaced warehouse-delivered brands on the grocery shelf, or at least have adversely affected their sales in many instances. I.D.F. 88–93.

Respondent Beatrice asserts that the Commission's decision in *Beatrice Foods Co.* ("Sexton"), 81 F.T.C. 481 (1972)

(footnote cont'd)

Lastly, there is the question of whether retail chains which sell their own brands of COJ are in the relevant product market. In addition to their sale of processor and dairy-owned brands to consumers, many retail chains, such as A&P, Safeway, and Kroger, buy juice from processors and sell it under their own brand label, which they market, advertise, and otherwise promote without substantial assistance from the processor. I.D.F. 122–24, 139, 146, 149; CX 593, p. 340–41. Their private label brands do compete [25] with brands owned by processors and dairies for sales to consumers. With very few exceptions, however, retailers are not vertically integrated backward into the processing and reconstituting of COJ, and the ALJ found that their private label sales would not have a substantial effect on competition at these levels. I.D. 62. Furthermore, retailers with their own private labels are dependent for their juice supplies on those processors with whom they compete for consumer sales; they are thus subject to any potential output restrictions imposed by their processor-suppliers, which serves to limit the competitive significance of their horizontal relationship with processors at the retail level. For these reasons, we conclude that the relevant market does not include retailers. At the same time, it does not follow that retail COJ brand share cannot be used as a measure of concentration in the relevant product market, to the extent it reflects reasonably accurately concentration and market shares in that market, *see* discussion at pp. 40–41 *infra*.[31]

We affirm the ALJ's conclusion that the relevant line of commerce in this matter is the processing, reconstituting, and relabeling of COJ for sale to the retail market. [26]

III. THE RELEVANT GEOGRAPHIC MARKET

The complaint alleged that the relevant section of the country for assessing the competitive effects of this merger is the United States as a whole and submarkets of it. Complaint counsel argue that the most appropriate geographic market is the nation, and offered no proof below of any relevant regional markets. Respondents contend the industry is divided into regional markets, citing the federal district court's finding in the preliminary injunction action of a nine-state area ranging from Colorado to Ohio as the relevant geographic market for assessing the merger. BAB 28. Respondents did not offer

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is persuasive precedent for their position that the existence of different methods of delivery establishes distinct lines of commerce between COJ sold by processors and dairies. BAB 31–32; BRB 38. We disagree. The Initial Decision and Commission opinion in that matter did note significant differences in two methods of distribution in the dry grocery institutional wholesaling industry. 81 F.T.C. at 496–98, 521. However, contrary to what respondents assert, or at least imply, BAB 32, neither the ALJ nor the Commission held that these different methods of delivery constituted separate and distinct lines of commerce within the institutional market. 81 F.T.C. at 504, 521 n.3.

[31] *See, e.g., Proctor & Gamble*, 63 F.T.C. 1465 (1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd* 386 U.S. 568 (1967); *General Foods*, 69 F.T.C. 380 (1966), *aff'd*, 386 F.2d 936 (3rd Cir. 1967).

proof of that or any other regional market definition in this proceeding, however, beyond minimal testimonial evidence. TAB 36–38. The ALJ agreed with complaint counsel, finding the nation to be the relevant geographic market. He based his conclusion on a finding that the three largest firms in the industry, Tropicana included, sell nationally, and on the need to analyze the merger on a national scale in view of the complaint's allegations that the competitive effects of the merger were industrywide. I.D. 57–58.

Tropicana, Minute Maid, and Kraft, the top three firms, sell their product to grocery stores throughout all or most of the country. I.D.F. 101. Tropicana distributes to the entire continental U.S. from its plant in Florida, but most of its sales (82%) are in the eastern half of the country. It offers a single cost-based F.O.B. Bradenton, Florida price, plus freight, throughout the U.S. I.D.F. 105; TAB 39. Accordingly, the distributional costs and price of Tropicana rise in direct [27] proportion to shipping distances, the primary reason most of its business is in the east, close to its single plant in Bradenton, Florida. Tropicana's single price, plus freight, is the price available to all of its retail customers, wherever located, except when Tropicana offers promotional discounts in local markets around the country. CPF 206–07. Tropicana has sales representatives in every state but Alaska and Hawaii, CPF 206, and advertises in the national as well as the local media. I.D.F. 212. Minute Maid produces COJ by first processing bulk concentrate at its facility in Florida and then shipping it to its seven reconstituting plants located around the country. I.D. 54. Minute Maid sells COJ in almost all parts of the country. Kraft processes and ships most of its COJ from its plant in Florida, concentrating its business in the eastern and central portions of the country. It reaches the west coast through a co-packing arrangement with Sunkist in California, whereby Sunkist processes the juice and provides it to Kraft for distribution under Kraft labels. I.D. 54.

These three national sellers of COJ generally base their prices to retail customers on processing and shipping costs, CX 593, p. 423–24, but monitor and respond to prices and other competitive conditions prevailing in various locales and regions. *See, e.g.,* TAB 19–20. They examine each other's prices most closely through sales data purchased from the A.C. Nielsen survey service. CX 560; Tr. 760, 1507. In addition, they use sales data and results from different regions in seeking sales in other areas of the country. CR 15. [28]

Almost all of the other hundreds of COJ processors and reconstituters sell to retail customers in various parts of the country ranging in size from large multi-state areas to sections of a single state.[32] By

[32] The president of Beatrice stated that he thought one and perhaps a few Florida COJ processors besides Tropicana shipped their product to California. CX 1650, p. 74.

1978, Beatrice had 12 milk plants reconstituting COJ in 11 states and distributing it to retail outlets in over 20 states, although its total market share was quite small. I.D.F. 231, 264. Its COJ operations are based mainly in the central and west central regions of the country, although they reach the west coast and the south as well.

Several dairies are large regional reconstituters of COJ which compete with local firms and usually one or more of the three national companies in their areas of operation. Hood, the fourth largest producer in the nation, operates primarily in the northeast and some in the southeast. I.D.F. 113. Ohio Pure Foods, Johanna Farms, and Home Juice are big in the midwest and plains states. Foremost-McKesson and Knudson are among those who are prominent in the west. With the exception of these and other large regional reconstituters, dairies which sell COJ tend to operate in only one or a few states. The scope of a dairy's COJ sales can be limited by little available capacity for reconstituting and packaging COJ, and by the advertising and marketing costs of competing for shelf space against well-known national and regional brand names. Perhaps more importantly, the distance which dairies can ship COJ from their individual plants is inhibited by transportation costs, [29] method of delivery, and product perishability. Such distances generally range from 150 to 500 miles. I.D.F. 270.

Like the leading firms, local and regional dairies in the industry get nearly all of their bulk concentrate supply from oranges grown and processed in Florida. The availability and price of COJ sold to the retail level throughout the nation thus is directly affected by conditions of supply in Florida. The local and regional dairies, in monitoring the prices of competitors in their areas, pay the most attention to the prices of the national brands with which they compete. Tr. 964–65, 1029, 1059, 1314, 1575; CPF 223, 242. In order to vie effectively for shelf space against the greater brand acceptance, loyalty, and advertising capacity of the national sellers, smaller competitors everywhere are forced to price their products substantially below those of the national brands. CX 560 (local and regional brands usually found to cost less than national brands in regional price surveys); I.D.F. 139, 217, 257; I.D. 55, 63. In this way, the three national sellers of COJ—Tropicana, Kraft, and Minute Maid—influence the terms of competition not only among themselves but also with those sellers with whom they compete only in local and regional areas across the country.

As this description indicates, the COJ processing and reconstituting industry shows many of the characteristics of a highly regionalized geographic market. The vast majority of firms in the industry operate locally and regionally, constrained from expansion by a variety of factors, most notably marketing costs and [30] restricted shipping

distances from individual plants.[33] They are not significant competitive factors in the sale of COJ to retail beyond their localized regions and, practically speaking, cannot readily expand into new areas in response to increases in price in those areas.[34] Thus, there could well be regional markets which might also be considered in judging the competitive effects of this merger—though, of course, the ability of national firms to expand into particular regional markets would have to be recognized in assessing any possible regional effects.

Unfortunately, we are unable to identify any relevant regional markets on the basis of this record. As previously indicated, complaint counsel made no attempt to prove a relevant regional market as an alternative to a national market. Respondent Beatrice, in asserting that the market is regional, did little more than rely on the Nine-State area found by the district court and contends that assessment of the competitive effects of this horizontal merger has to be limited to this alleged area of [31] pre-merger competitive overlap between Beatrice and Tropicana. We reject this view as contrary to existing authority, which recognizes that the competitive effects of a merger between competitors can sometimes be felt beyond the immediate areas where they directly competed with each other. *See, e.g., Jim Walter Corp.,* 625 F.2d 676 (5th Cir 1980); *Brown Shoe,* 370 U.S. at 336–37; *RSR Corp. v. FTC,* 602 F.2d 1317 (9th Cir. 1979); *Spaulding,* 301 F.2d at 606; *U.S. v. Bethelem Steel,* 168 F.Supp. 576, 600 (S.D.N.Y. 1958).[35] Further, there is little evidentiary proof in the record that this Nine-State region comprises a reasonably well-defined, distinct group of COJ processors and reconstituters. The fact that it may be a general area of overlap of the two merging firms proves little if anything in defining the relevant geographic market.

The other regional markets proposed are internally inconsistent with respondent Beatrice's own erroneous "overlap" test of definition, in that they are not stated to be areas of competitive overlap, and otherwise suffer from a similar lack of proof. Respondent Tropicana suggests there are 7 to 12 regional markets, none of which corre-

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[33] By way of illustration, it is useful to mention the unsuccessful attempt by Hood, the largest regional reconstituter in the country, to expand beyond its New England base to the midwest. The record indicates the expansion effort failed due to advertising, marketing, and shipping barriers.

It also bears mentioning that while Minute Maid sells throughout most of the U.S., its reconstituting centers can only distribute COJ regionally in light of the limited distances COJ can be transported. Only Tropicana, and to a lesser extent Kraft, have managed to overcome the barriers to shipping COJ long distances from individual plants on close to a national scale. And, as the ALJ found, transportation costs have limited Tropicana's growth in the far west. I.D. 53.

[34] *See* discussion of geographic market considerations in the DOJ Merger Guidelines.

[35] Respondents rely heavily on *U.S. v. Philadelphia National Bank,* 374 U.S. 321, 357 (1963), in which the Supreme Court said that the relevant inquiry should be where "within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." That decision does not support respondent Beatrice's proposition. In the first place, the geographic market found in that case did not reflect perfect competitive overlap between the merging banks and other banks included in the market. Secondly, a horizontal merger can have a "direct and immediate" effect *outside* the precise area of competition between the merging firms.

sponds to Beatrice's nine-state area. [32] The 12-market estimate comes from Kraft's 12 sales areas, as described at the trial below by an official for the company. These areas were designated by Kraft only for its own sales management purposes, and there is no other evidence in the record to indicate they are separate markets. CAB 33. The 7-market estimate, also proposed by respondent Tropicana, corresponds only to Minute Maid's areas of distribution from its regional reconstituting centers. *Id.* In sum, there is insufficient proof in the record to establish these areas as relevant geographic markets under the accepted methods of definition. We conclude that the record fails to delineate any relevant regional markets which, on the basis of regional shipping patterns and other factors, could be reasonably assumed to exist in the COJ industry.

We are thus left to decide whether the record will support the ALJ's finding of a national market in the absence of proof of relevant regional sections of the country within which to test the merger. In determining whether such a broader market exists, it is necessary to consider the ability of firms in the industry to overcome shipping limitations in attempting to reach more distant markets, the extent to which prices found in various regions are interdependent with one another, and other pertinent factors.

Upon review of the record, we believe there is enough evidence to support the finding of a national market, although it is quite possible that regional markets could also exist which would reflect, perhaps more precisely, the commercial realities of the COJ industry and the competitive effects of the merger. In the first place, the area of actual and potential competitive [33] confrontation was itself not insubstantial; it appears that before the merger Beatrice and Tropicana actually or potentially overlapped in nearly 55 cities in 21 states in several diverse regions of the country comprising a substantial majority of the national population.[36] Evidence that merging firms were serving most of the national buying population in the relevant product market prior to the merger has been taken into account in defining the geographic market as the entire country.[37] We believe the nationwide sales of COJ by Tropicana, coupled with Beatrice's geographically broad reconstituting and distributional system, constitutes one indicia of a national geographic market in this case.[38]

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[36] CAB 29. Prior to the merger, both Beatrice and Tropicana sold their COJ products to the retail market in the far west, rocky mountain, southwest, midwest, and southern regions of the country. I.D.F. 110, 115. According to 1970 census figures, the population within the area generally or potentially served by Beatrice through its vast milk distribution network, and with which Tropicana's natiowide sales substantially overlapped, represented nearly 80% of the entire U.S. population. CX 2306 A-Z-2.

[37] *RSR Corp. v. FTC*, 602 F.2d 1317, 88 F.T.C. 873, 883 (1976).

[38] Beatrice's *de minimis* market share, smaller than that of the large regional dairy reconstituters such as Hood, belies its geographically wide area of distribution, which spans much of the country and is much larger than that of those firms.

Another one is the fact that the other leading firms in the COJ industry, Kraft and Minute Maid, along with Tropicana, also sell COJ to the retail market throughout all of most of the nation. I.D.F. 101. Like Tropicana, Kraft concentrates its COJ sales from its Florida plant in the southeast, but has been able to ship product from that plant to the midwest and west central U.S. [34] beyond the usual upper limit of 500 miles. As already mentioned, it also reaches the west coast through a co-packing arrangement with Sunkist. Minute Maid sells nationally through its 7 reconstituting plants, which receive their supply of bulk concentrate from Minute Maid's processing plant in Florida, which is not subject to shipping restrictions. There are thus three firms in the industry, controlling a majority of total industry sales, which have developed means to distribute COJ great distances to all or most of the nation despite the associated high transportation costs.[39] They represent alternate sources of COJ supply to the retail market throughout the country and, generally speaking, have the capacity to increase or expand sales into most areas of the country in response to price rises or other competitive openings. There is a fourth company, Beatrice, which through its geographically diverse distribution network also represented an actual or potential alternate source of supply to much of the nation prior to the merger. Transportation barriers to distant shipping, a reality for most of the firms in the industry, have not been an insurmountable obstacle to these particular firms. While we reiterate that the regional shipping restrictions which apply to the great majority of firms in the industry strongly suggest the existence of regional markets as well, the wide geographic, or even nationwide, scope of sales by all the leading firms and Beatrice constitutes evidence of a national market. [35]

Pricing patterns in this industry also lend some support to a national definition of the geographic market. A common pricing factor taken into account by retail customers in different sections of the country is the uniform F.O.B. price, plus freight, which Tropicana charges wherever it sells its COJ product. I.D.F. 105.[40] The ALJ found that other COJ processors and reconstitutors around the country typically regard this price as a ceiling, and accordingly set their own prices beneath it.[41] Such smaller firms, including Beatrice, tend to charge less than the price of Tropicana and the other national brands because that is the only way they can compete against the strong

[39] The ALJ also found that these firms centrally plan, price and advertise sales of COJ to retail on a national basis. I.D.F. 104, 106, 107, 109.

[40] Tropicana, as well as Minute Maid and Kraft, discounts price in various sections of the country as local competitive circumstances dictate.

[41] The ability of a firm to impose a price ceiling in a distant area has been cited as evidence of regional interdependence indicative of a broad geographic market. *See Bethlehem Steel Corp.*, 168 F.Supp. at 600.

consumer loyalty attached to these brands. Conversely, the national firms centrally monitor local prices through regional sales reports and Nielsen data, and are in a position to move shipments around in response to localized price changes and promotions. We believe the external influence that Tropicana's uniform pricing policies (and those of the other two leading firms) have on local pricing decisions, along with their practice of adjusting their centrally set prices where necessary to respond to local competitive conditions, demonstrates some regional interdependence mildly supportive of a determination of a national market in this industry. [36]

We find the record capable of sustaining the ALJ's finding that the relevant section of the country in this matter is the nation as a whole. The three largest firms in the industry, including one of the merging partners, compete on a nationwide level.[42] While freight costs limit the distance to which individual plants can readily ship COJ, the constraint is only relative, and, as we have seen, certain firms do send their product into regions far distant from their plants, where they are able to respond to local competitive conditions. In particular, both of the merging firms here serve, or have the capacity to serve, all or almost all sections of the country and most of its buying population, and overlapped before the merger in diverse regions of the country.

Our finding that the competitive effects of the merger can be weighed in a national market is not inconsistent with our belief that regional markets, albeit undefined, probably exist as well. It indicates only that the relevant line of commerce in this case is both regional and national in character, and illustrates once again the often unavoidable imprecision of geographic market drawing in antitrust analysis. Yet the imprecision is not so great here as to prevent a determination that the U.S. as a whole is an appropriate geographic market for an examination of the competitive effects of the merger, to which we will now turn. [37]

IV. COMPETITIVE EFFECTS OF THE MERGER

Before we discuss the competitive impact of the merger, we need to resolve a threshold dispute between the parties over the appropriate data base which should be used to estimate market shares and concentration levels in the COJ industry. Over respondents' objection the ALJ relied on Nielsen retail brand surveys in making these determinations, finding that they provided the most accurate evidence of the

[42] In the matter of *The Procter & Gamble Co.*, 63 F.T.C. at 1561, where a national market was stipulated but nonetheless questioned by the Commission because of the prevalence of regional shipping patterns, only one firm in the industry was a national producer. Here there are three, and a fourth that had a preexisting distributional capacity for nearly nationwide sales.

market available. I.D. 54.[43] Below we examine the merits of respondents' attack on the reliability of the Nielsen evidence.

The essence of respondents' objection is that the Nielsen surveys cannot be relied upon because they seriously understate the actual size of the relevant market by concentrating inordinately on the major chains in big city markets while missing grocery stores outside urban areas. Respondents argue that this alleged defect has the effect of significantly overstating industry concentration and the market shares of Tropicana and the other leading firms, which make most of their sales in the big cities. Respondents attempt to establish this allegation by questioning the validity of the Nielsen methodology itself, by asserting that it is not relied upon by the industry to measure market shares, and by citing the industry sales data of Dr. Jay Gould, an economist retained by respondents, which allegedly show that the market is much larger than the Nielsen estimates. **[38]**

The Nielsen Retail Index, established in 1934, CX 517C, has become a household name in American business. It is widely used by a variety of industries to monitor business performance by measuring sales and market shares for its subscribers and their competitors. CX 517 F, J. The accuracy of Nielsen's findings depends, of course, on the reliability of its sample as an indicator of the structure and size of the market. Nielsen's national store sample is derived from regularly updated U.S. Census data and its own detailed accounts of large and small stores by geographic area. CX 517 R. Selection of stores for the sample is determined mathematically to minimize bias. CX 517 R-S. Of particular relevance to the present proceeding, Nielsen indicates that it designs its grocery store sample to include the extremely important universe characteristics of geographic location of stores and their sales volume. CX 517 S. Its 1600-store grocery sample "is designed to achieve maximum geographic dispersion, containing stores located in some 600 counties in the 48 contiguous states."[44] *Id.* At the same time, it attempts to take a realistic picture of actual overall sales activity by including more stores with large sales volumes than with small ones.[45] **[39]**

Respondents contend that this methodology produces an unrepresentative picture of the market because it misses hundreds of brands sold in smaller stores not reflected in the sample, and because Meadow Gold, which is sold by Beatrice in over twenty states, showed up in only one store in a special Nielsen survey commissioned for

[43] The ALJ made this finding without discussion. Some analysis in support of the finding would have been helpful to the Commission in its review of the issue.

[44] Nielsen maintains that such dispersion makes its sample of value to regional as well as national sellers. CX 517 S.

[45] Such disproportionality "creates the equivalent, from the standpoint of accuracy, of a much larger sample," CX 517 T, serving to assign the correct proportional weight to the relative sales of large and small stores in the market. CR 83–84.

respondents. BAB 23; RX 255.[46] Yet the logic of the Nielsen methodology seems self-evident and likely to enhance the projectability of its findings to the entire retail market. Insofar as the national and major regional brands dominate the market and sell in the high-volume stores, while the smaller brands like Beatrice's are found less in the big stores and more in the smaller ones, Nielsen is not "missing" smaller brands, it is simply reflecting their proportionately smaller presence in the market.

Testimony from the representatives of all the leading firms and other industry officials clearly establishes that Nielsen is regarded as the most reliable and most relied upon measure of the [40] market. CPF 247–255.[47] Respondents contend, however, that it measures only market trends, not brand shares. This assertion is not supported by the record. The witnesses for every major firm, including Tropicana, testified that they rely on Nielsen—often exclusively—for market share as well as market trend information. CX 593, p. 24, 94–95 388–89; CX 1650, pp. 135, 139–40; Tr. 780, 782, 1318, 1496–97, 2903. This testimony corroborates Nielsen's own statement and reports, *see, e.g.,* CX 517 F,G, which indicate that it provides market share as well as various other kinds of data to its users.[48]

Despite the strong evidence in support of Nielsen, respondents urge us to find, on the basis of Dr. Gould's estimates, that the Nielsen data materially understate the size of the market to [41] Tropicana's legal detriment.[49] For fiscal 1978, Nielsen found that there were 204.1 million gallons of COJ sold for $545.2 million at retail.[50] This is substantially less than Dr. Gould's estimate, which for calendar year 1977 was $780 million. RX 2401.[51] Dr. Gould's $780 million estimate includes sales of other types of citrus juice, not just COJ. CR 78; RX 2401, pp. 205–210; Oral Arg. Tr. at 41. Further, his estimates for total

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[46] The above-mentioned Nielsen survey indeed proves that Meadow Gold was observed while it does not, on its face, establish respondent Beatrice's proposition that it was seen in only one store in the national survey. RX 255; *see also* CR 59.

[47] The witness for the Florida Department of Citrus, which uses Nielsen, said it "represents the entire retail food market . . . certainly the best for retailing." Tr. 1827–28. The sales manager for Tropicana testified that Nielsen is accurate to a 95% confidence level and is representative of retail stores throughout the U.S. CX 593, p. 194, 255–57. He further testified that it covers even small "convenience" stores, and that he could not name one type of retail food outlet that it did not include in its survey. Id. at 181 (*in camera*). A spokesman for Minute Maid also vowed that Nielsen was reliable and produced results remarkably close to Minute Maid's own sales data. Tr. 783. Finally, Dr. Gould, respondents' expert, testified that he had a high regard for Nielsen methodology. CX 2313, p. 56.

Respondent Beatrice implies that the reliability of Nielsen is unproven because no one from Nielsen testified in support of it. We reject such an inference, concluding that Nielsen's reliability has been established by its wide use and acceptance in the industry.

[48] We have relied on Nielsen grocery store samples in prior proceedings to obtain market share and concentration statistics. *See, e.g., FTC v. Proctor & Gamble,* 63 F.T.C. at 1536.

[49] Acceptance of respondents' estimates of Tropicana's market share over complaint counsel's would leave Tropicana with a substantially smaller market share and considerably lessen the level of concentration in the market. BAB 25.

[50] I.D.F. 121; CX 5602–24.

[51] RX 2401 contains Dr. Gould's testimony in the federal district court proceeding concerning this acquisition. He was deposed in the administrative proceeding below, *see* CX 2313, but did not testify at the trial.

production of COJ, which fall in the $600–650 million range, include sales to institutional (*e.g.*, restaurants, hospitals, schools) as well as to retail customers. RX 2401, pp. 206–210. If institutional sales are subtracted,[52] Dr. Gould's estimates would not necessarily be inconsistent with the retail sales of $545 million estimated by Nielsen. Further, the Nielsen estimates are corroborated by the calculations of other citrus industry experts. *See, e.g.*, Tilley, CR 79–81 *in camera*. In short, Dr. Gould's testimony, when broken down, does not refute the reliability of the Nielsen data. [42]

We conclude the record evidence strongly supports the use of the Nielsen surveys as a reliable measure of the relevant market in this case. While Nielsen observes market activity only at the retail level, it appears here to provide a reasonably accurate reflection of concentration and market share in the processing and reconstituting of COJ for sale to the retail level. The universe of retail sales of COJ should be about the same size as that of COJ sold to the retail market, except for unsold inventory. The percentage of retail sales that a reconstituter like Beatrice realizes should reasonably reflect its market share at the producing level, since it sells all of its brand *directly* to the retailer. Further, the retail brand share of processors like Tropicana should conservatively reflect their share of the relevant market, since a small percentage of the product they process is distributed to retail by other firms under those firms' labels, and under our definition of the relevant product market would be attributed to the other firm's market share.

A. *Horizontal Effects*

This case involves the acquisition of the largest firm in the relevant market by the nation's largest diversified food processor, which had a very small presence in the COJ market at the time of the acquisition. A key precedent for analysis of such a merger is the Commission's decision in *Heublein Inc.*, 96 F.T.C. 385 (1980). Under that case, it must be shown that the market is concentrated and that the market share of the smaller merging firm materially understates its true competitive significance and potential at the time of the acquisition. The ALJ found that these criteria were [43] met. We disagree, and reverse the ALJ's finding of a Section 7 violation on a horizontal theory.

Using Nielsen data, the ALJ found that for 1978, the year of the merger, Tropicana's market share was 29.9%, I.D.F. 123, the highest in the COJ industry, and Beatrice's was .57%, I.D.F. 213, a neglible

[52] While the record does not indicate the total annual amount of such institutional sales, we can reasonably infer from the great number and size of the institutional purchasers of COJ that they are in the scores of millions.

percentage.[53] At the time of the acquisition, four-firm concentration was 60.2%, reflecting "moderately high" concentration under existing authority[54] and the Justice Department Merger Guidelines.[55] Two-firm concentration was 45.4%, which is quite high and a source of greater concern than the four-firm ratio, at least under the view that two-firm ratios may be more useful than four-firm figures in assessing the likelihood of anticompetitive interdependent behavior.[56] However, while these concentration levels are high enough to trigger antitrust concern, we still must examine other relevant characteristics of the market to determine whether the merger is likely to be anticompetitive. This additional analysis is particularly necessary here, given the somewhat imprecise character of the relevant product and geographic [44] markets that are capable of being drawn on this record. As noted by our Merger Statement at pp. 5–6 and the DOJ Guidelines at ¶III(C)(1)(b), market share data should be given somewhat less weight than usual when the market definition is ambiguous or when products outside the relevant market may still be reasonably close substitutes.

Horizontal violations have been found in a few cases involving only a minimal increase in concentration, but rarely in one with an increase as tiny as that in this proceeding.[57] In assessing the competitive consequences of mergers which increase concentration to such a slight degree the courts have focused on the following qualitative criteria in addition to market share and concentration statistics: (1) merger and concentration trends; (2) the existence of barriers to entry; (3) evidence of interdependent pricing and other potentially collusive behavior; (4) the extent of actual competition between the merging firms; (5) the degree of vertical integration among competing firms; and (6) the degree to which the [45] market share of the smaller firm understates its true competitive importance in the relevant market.[58]

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[53] Market share and concentration statistics used herein reflect gallon sales, not dollar sales.

[54] *See Heublein*, 96 F.T.C. at 577, n. 9.

[55] Under those guidelines, this 4-firm ratio would fall within the range of moderate concentration (1000 to 1800) on the Herfindahl-Hirschman Index.

[56] Id. at 577. The disparity between the market shares of the top 2 firms, Tropicana and Minute Maid (15.5%), or the top 3 if we include Kraft (10.4%), and the rest of the firms in the industry, is quite dramatic. This is a factor which the Commission recently said requires "particular attention" in market share and market performance analysis. *See* FTC Merger Statement at 3.

[57] The ALJ relies on *Federal Trade Commission v. Pepsico, Inc.*, 477 F.2d 24 (2d Cir. 1973), which involved an action for a preliminary injunction against the acquisition of a firm with 0.3 to 1% of the relevant market. While the court of appeals upheld the finding of a reasonable probability that the merger was anticompetitive, it did so on the basis of an incomplete record and incomplete analysis of the likely competitive effect of the merger. Id. at 27. As such, only limited weight can be given to the decision. To the extent it is authority, moreover, the decision is factually distinguishable from the present matter in that there was evidence of much higher concentration and a pre-merger trend in the soft drink industry. Id. at 26. Finally, it remains the only decision to date we are aware of which has held that a merger involving a market share as low as Beatrice's may be a horizontal violation of Section 7.

[58] *See* our application of horizontal merger case law in *Heublein*, 96 F.T.C. at 578–82; *see also* FTC Merger Statement at 3–8 and DOJ Merger Guidelines at ¶ III (B)-(C).

On the surface the present acquisition resembles somewhat past acquisitions which were held unlawful by reference to the above criteria. Like *Alcoa-Rome* and *Stanley Works v. FTC,* 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the present case involves the leading firm in an industry which was fairly heavily concentrated at the time of the merger.[59] In addition, the ALJ found that Tropicana was a "price leader" in the COJ market, I.D.F. 153, a factor that received considerable weight in the finding of violation in *Stanley Works.* On closer analysis, however, the two cases are not analogous. In *Stanley Works,* price competition was already limited in the relevant market and there was evidence Stanley would bring to that market its policy of minimizing price competition that it had displayed in other product lines.[60] Under these circumstances the Second Circuit concluded that the acquisition of the market leader by a company like Stanley posed a dire threat to competition in an already competitively weak industry. We do not find the same circumstances here. The ALJ made no findings that Beatrice has operated in other markets as a [46] price leader in the same anticompetitive fashion as Stanley. Also, there is little evidence of such limited price competition in the COJ industry. While Tropicana and the other national sellers are "price leaders" insofar as they establish price ceilings, there is nonetheless evidence of meaningful price competition in this industry. The record shows that the rest of the industry competes by underpricing Tropicana and the other large firms, indeed, that they must do so in order to compete effectively against the brand name recognition and consumer loyalty attached to the national brands. I.D.F. 139, I.D. 62–63. It is not surprising, therefore, that the ALJ found the COJ prices of a dairy like Beatrice to be on the average 25–35 percent below those of national brands like Tropicana. I.D.F. 217. Given these findings and the lack of evidence in the record that Beatrice through its acquisition of Tropicana is likely to suppress price competition in the COJ market, we do not find the imminent threat to competition resulting from the merger that was central to the Second Circuit's holding in *Stanley Works.*

Barriers to large-scale entry in this industry are high but do not appear to have unduly impaired competition in the COJ market. Large-scale entry requires access to large and reasonably certain supply, substantial plant and distributional capacity, a big advertising budget and/or established brand name, and a large, aggressive sales force. I.D.F. 267. A few firms, most notably [47] Minute Maid and the big regional processors, have overcome these barriers to varying de-

[59] Indeed the market share of Tropicana is even higher than that of the larger firm in each of those cases. Also, 4-firm concentration in the COJ industry at the time of the acquisition was greater than that in *Stanley Works,* but less than that in *Alcoa.*

[60] 78 F.T.C. 1023, 1067–1074 (1971).

grees and become significant competitors.[61]

In addition respondents contend that Minute Maid represents just the beginning of a new wave of entrants who will be trying to capitalize on the growing demand for COJ over FCOJ. They argue that FCOJ packers and even grocery chain stores are likely entrants. It is not clear, though, that such entities, even if they have the incentive to enter, have the necessary capacity for entry on a national or even broad regional scale. Minute Maid's growth, while extraordinary, illustrated what it takes to become a significant, potentially destabilizing force in the national COJ market.[62]

While large-scale entry appears extremely difficult, the record indicates that small-scale entry by dairies into the COJ market is easy and fairly common. I.D.F. 131, 134–35. The ease and prevalence of such entry by dairies on the local and regional level, who compete by underpricing the big firms, serve to maintain a reasonably competitive marketplace offering consumers [48] a fairly wide range of COJ quality and price.[63] In our judgment this reality, along with the economic incentives for at least modest entry and expansion created by the great growth in demand for COJ, checks at least somewhat the risk to competition otherwised posed by the high barriers to major entry.

Next we must decide whether the market shares of Tropicana and Beatrice reasonably reflect the degree of competition between them that would be sacrificed by the merger, and whether Beatrice's *de minimis* share accurately reflects its true competitive significance in the COJ market. The ALJ seemed to indicate that the evidence that they regarded each other as competitors and directly competed with each other in various locales, *see* I.D.F. 218–226, is sufficient to establish that Beatrice's .57% share of the national market reasonably reflects the degree of actual competition between them. This is open to question. While the two firms generally overlapped in several regions, their respective operations were concentrated in different regions—Tropicana in the east, Beatrice in the midwest and west. While the record does show actual competitive confrontation in some areas, and the potential for direct [49] competition in many others, it will

[61] Minute Maid, of course, has been an exceptionally successful entrant as a national seller of COJ, using heavy advertising to increase its market share from 7.3 percent in 1975 to 19.4% in 1979, the 2nd highest. I.D. 55.

[62] While Minute Maid's entry did not reduce overall industry concentration before the merger, it may still have benefited consumers and price competition by accelerating the trend from glass to lower cost paper orange juice containers. There is some evidence that Tropicana, which once sold COJ only in glass bottles, has increased its sales of COJ in paper cartons, perhaps in response to the Minute Maid challenge.

[63] The ALJ found such entry responsible for much of the recent growth in COJ sales, I.D.F. 253, and further found that industry trends are moving in the direction of increased reconstituting of COJ by dairies outside Florida to avoid the high freight costs associated with juice processed in and shipped from Florida. I.D.F. 293–99. Somewhat contradictorily, however, he also found that local COJ processors are becoming a less important factor in the COJ industry, based not on evidence of less competition by such firms but on a moderate increase in concentration prior to the acquisition. I.D. 63; I.D.F. 122–23. We question whether the latter finding can be made on the basis of the concentration data alone.

not support a finding of heavy competitive overlap of their sales.[64] If anything, it suggests that overlap in the national market is far from substantial and that Beatrice's .57% market share may well overstate the head-on competition that was eliminated by the merger.

The ALJ further found that Beatrice was a more significant competitive force in the market than its *de minimis* market share would suggest. This finding must be examined by reference to *Alcoa-Rome,* as interpreted in *Heublein.* In *Alcoa-Rome,* the Supreme Court said that Rome's small market share significantly understated its competitive potential, based on evidence that Rome was an unusually aggressive competitor and technologically-skilled innovator in the relevant product market. In *Heublein,* the Commission read *Alcoa-Rome* to require proof that the firm is a truly special or unique small competitor—with a clear capacity to destabilize the market—as measured by such qualities as originality in product research and development and boldness in price competition. 96 F.T.C. at 581. Absent these qualities, we said there, evidence that the firm was outstanding in other areas, such as advertising and [50] marketing, would not be enough to find that a firm was a special small competitor within the meaning of *Alcoa. Id.*[65]

In support of his finding, the ALJ said that while Beatrice was not an innovative competitor, it possessed "great potential capacity" and a "unique ability" for marketing COJ nationally through its vast system of milk plants—the largest in the country. I.D. 60, 65. Combined with evidence of Beatrice's growing interest and expansion in the reconstituting and marketing of COJ prior to the merger, *see* discussion at pp. 58–60 *infra,* the ALJ believed this was enough to support a finding that Beatrice's small market share substantially understated its competitive significance and made it, in effect, a "special small competitor" within the meaning of *Alcoa* and *Heublein.* I.D. 61.

We agree with the ALJ that great skill and resources in advertising and marketing appear necessary to gain sizeable market share in the COJ industry. Tropicana and Kraft, the traditional leaders in the market, have won consumer loyalty largely by virtue of established brand name recognition and sustained promotion of their products. The other large firm, Minute Maid, soared from zero to over 19% of the market in less than a decade on the strength of massive advertis-

[64] We do not mean to imply that evidence of substantial competitive overlap is necessary to a finding of horizontal violation. However, as we said in *Heublein,* the extent of head-on competition in a merger case involving a firm with a very small market share is relevant in evaluating whether that share realistically represents the firm's actual competitive position and significance in the industry. 96 F.T.C. at 581, n. 15. *See also* DOJ Merger Guidelines at ¶ III (C)(1)(c).

[65] Specifically, we said "it would distort *Alcoa's* definition of the special small competitor to make advertising or marketing, except in special circumstances not present here, a distinguishing characteristic." *Heublein,* 96 F.T.C. at 581.

ing and marketing expenditures which had the effect of extending preexisting loyalty to the Minute Maid name to its COJ product. I.D. 55. These three national sellers have the capacity to [51] utilize and rely on their well-known names and superior advertising resources as a means of maintaining their market strength to one degree or another against numerous competitors who have to compete on price rather than promotion because they lack a comparable ability to win sales through heavy advertising and marketing.

In short, large-scale entry and expansion in the national COJ market has not been achieved, and appears virtually unattainable, without the capacity to advertise, market and promote one's product on a large scale.[66] Beatrice, as the largest diversified food processor in the nation and second largest advertiser of consumer food, has demonstrated that capacity in many of its other product lines. I.D.F. 279–83, 287. Although it showed no special or unique marketing skills or commitment in its *COJ line* prior to the merger, one may reasonably assume that if in fact it had intended to expand significantly in the COJ market other than by a large acquisition, it possessed the requisite advertising and marketing resources, as well as distributional means, to achieve its ends. Indeed, in view of its track record in other product areas and status as the only "conglomerate" among the "small" firms in the national COJ market at the time of the acquisition, it is [52] probable that Beatrice's ready capacity for such expansion was unique. Accordingly, this possibly could be seen as one of those *exceptional* cases mentioned in *Heublein* where the possession of a unique advertising and marketing capacity makes a company a "special small competitor" within the meaning of *Alcoa*.[67] To the extent such capacity is essential to enable a firm to become a destabilizing force in the relevant market, it is arguably the functional equivalent of product innovation or aggressive pricing as a catalyst for competition.

Still, the record does not show that Beatrice had begun or firmly committed itself to actually utilizing its full advertising and marketing capacity in the relevant product line prior to the merger, and we are thus reluctant to classify it on this basis as a special small competitor in the COJ market at the time of the acquisition. We believe that *Alcoa-Rome* requires primarily a look at factors other than a

[66] Of course, a firm must also possess the capacity to process and distribute on the same scale. This requires the capacity to operate several geographically varied processing and distribution centers, which Minute Maid has, or the unusual capacity to ship long distances, which Tropicana has shown. It is no doubt true that many of the dairies which reconstitute COJ lack these capacities for growth, in addition to lacking the requisite advertising and marketing capacity.

[67] It is important to emphasize that unlike the market in *Alcoa-Rome* and perhaps the market in *Heublein*, technological innovation is not a critical competitive factor here. Despite differences in quality and shelf life among competing COJ products which reflect how the product is processed and packaged, the potential for technological advancement in the making and shipping of COJ is finite.

firm's mere possible plans for expansion, in assessing its true market significance in a horizontal merger analysis. Otherwise the legal theories of horizontal and actual potential competition, which rest on different analytical criteria, would begin to lose their individuality. The absence of factors which would allow us to conclude that Beatrice was a special small competitor within the [53] meaning of *Alcoa* and *Heublein,* combined with Beatrice's extremely small market share, argues strongly against a finding that the merger is unlawful on a horizontal theory of violation.

Lastly, concentration trends are available as an index of the competitive effect the Beatrice-Tropicana merger is likely to have on the COJ market. The ALJ found this factor dispositive in his horizontal analysis of the merger. Unlike the Commission's findings in *Heublein,* the ALJ found here a strong trend toward concentration prior to and continuing after the merger. Four-firm concentration rose from 55.8 percent in 1975 to 60.2 percent in 1978, the year of the merger, and to 64.2 percent for a two-month period shortly after the merger. I.D.F. 122–23; I.D. 60. In contrast, there was no similar pre-merger trend in *Heublein,* and a sharp post-merger increase in concentration in that case was tempered by a subsequent decline. We said that the net increase there from 47.9% to 54.2% in an eight year period was "insufficient to elevate to the level of a violation the increase in concentration resulting from this merger." *Heublein,* 96 F.T.C. at 582. We reach the same conclusion here. While the COJ market was somewhat more concentrated than the *Heublein* all-wine market at the time of the present acquisition, and while the increase in concentration over a several year period was slightly higher in this case than in that one,[68] we cannot say that the difference is great enough, particularly in view of recent trends discussed below, to support the ALJ's finding that [54] the trend toward concentration in the COJ market, by itself, is what "clearly distinguishes" this case from *Heublein.* I.D. 60.[69]

Furthermore, updated Nielsen data indicate there has been a trend toward *less* concentration in the COJ market since the merger, including a recent drop of several points in Tropicana's market share.[70]

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[68] 8.4% here between 1975 and 1979, and 6.3% there for a 7 year period.

[69] In distinguishing the two cases, the ALJ seemed to focus more on a 2.5% decrease in concentration in *Heublein* over the latter half of the period in question, rather than on the overall net increase of 6.3% for the entire period. Looking at the whole trend, rather than just the part, the distinction appears to be one without much of a difference.

[70] We grant respondents' motion for limited reopening of the record, filed November 3, 1981, to receive the new Nielsen evidence. Post-acquisition evidence of concentration trends can be relevant and the Nielsen data, as the record shows, is highly reliable. Also, the post-acquisition evidence in this case largely corroborates the evidence of record supporting our finding that concentration trends are not dispositive of the anticompetitive effect of this particular merger. Were post-acquisition evidence dramatically different from the record evidence, we would be much less inclined to admit it until and unless it had been subjected to cross-examination by the party adversely affected by it.

After rising to 62.9% in 1979, 4-firm concentration dropped slightly to 61.3% in 1980 and appears from the bimonthly data to have slid even further in early 1981, although yearly figures are not available.[71] Finally, the new Nielsen figures show an increase from 20.2% in 1980 to around 24% in the first half of 1981 in the "all other" category of COJ, which includes, *inter alia,* the sales of the local and regional producers. This post-acquisition evidence, while not dramatic, **[55]** does undercut a finding of horizontal violation based on concentration trends in the relevant market.

In summary, the record does not support the ALJ's view that the merger substantially lessens horizontal competition in the relevant COJ market. We emphasize that in a case in which one of the merging firms has only .57% of the relevant market, the party challenging the merger is under a particularly heavy burden to show that notwithstanding the *de minimis* increase in concentration, the merger is anticompetitive and a violation of Section 7. That showing was not made here.

B. *Potential Effects*

The more plausible theory of violation in this proceeding is that the merger had the probable effect of eliminating Beatrice as a special potential expander and deconcentrator in the national COJ market. Complaint counsel alleged, and the ALJ agreed, that the merger could be held unlawful on this theory. We disagree, finding the record insufficient to support this conclusion. Before we can even reach the merits of this issue, however, it is necessary to deal with respondent Beatrice's threshold argument that complaint counsel's allegations of Beatrice's plans to expand are based on a "potential competition" theory of liability which was not pled by the complaint and which, therefore, cannot be used to establish a finding of illegal conduct.

In the particular circumstances of this case respondent Beatrice's argument presents a very close question, but on **[56]** balance we hold that no potential competition theory of liability was pled in the complaint and that it is therefore inappropriate to consider evidence under this theory. We accordingly decline to rely on this theory in assessing the legality of the acquisition.

We recognize that a respectable argument can be made in support of the proposition that an implied potential competition count was pled in the case. Although the complaint does not expressly allege that the merger would eliminate potential competition by Beatrice, the absence of such language does not necessarily compel a reversal

[71] Two-firm concentration did rise from 45.4% in 1978 to 49.3% in 1980, appearing to reflect an increase in Minute Maid's market share to 20.8%. However, it declined considerably in the first half of 1981, mainly as a result of Tropicana's market share dropping to around 24% during that time.

of the Initial Decision on this ground. The Commission's rules simply require that complaints provide "a clear and concise factual statement . . . of the type of acts or practices alleged to be in violation of the law,"[72] and need not plead the evidence upon which complaint counsel will rely. In construing such complaints, including the one here which uses legal terms such as "actual competition," it is appropriate to look to the case law interpreting the term, particularly contemporaneous case law that might shed light on what questions the Commission, in exercising its law enforcement discretion, intended to authorize complaint counsel to litigate. Under such contemporaneous precedent, a Commission complaint that pled only actual competitive effects has not automatically foreclosed inquiry into the loss of potential competition as well, particularly in the case of the elimination [57] of a potential expander, as Beatrice was alleged to be here. In such cases, the Commission has recognized that there is "no clear line between actual and potential competition theories," *Retail Credit Co.,* 92 F.T.C. 1, 152 n. 43 (1978), *rev'd on other grounds,* 616 F.2d 63 (9th Cir. 1980), and—of particular importance to the instant case—has held potential expander evidence relevant to a horizontal as well as a potential competition theory of liability. *Stanley Works,* 78 F.T.C. at 1064; *Pillsbury Co.,* 93 F.T.C. 966 (1979).

On the other hand, while the line between these two theories has not always been "pristine" clear, generally speaking they have become sufficiently distinct and well-established that a complaint pleading one theory, unless amended in accordance with Commission Rule 3.15(a)(1), would not ordinarily allow proof primarily relevant only to the other.[73] The complaint here not only does not specifically allege any effect on potential competition, it clearly speaks in terms of an effect on "actual [58] competition." *See* Paragraphs 13, 15 (a)-(b).[74] Given the reasonably clear distinction between the two theories, the Commission, with its own antitrust expertise, presumably would have distinguished between them and understood the legal significance of using only the term "actual competition" in pleading the anticompetitive effects of this acquisition. Considering the Commission's conscious choice of this particular complaint language, com-

[72] Commission Rules of Practice, Section 3.11(b)(2).

[73] This became particularly true following the Commission's decision in *Heublein,* which clarified that it is necessary to examine the issue of potential expansion within the analytical framework of potential competition antitrust theory, under the criteria for conglomerate merger enforcement established in *United States v. Marine Bancorporation,* 418 U.S. 602 (1974).

[74] The complaint allegation that as a result of the acquisition, "the previously existing level of concentration . . . will be increased and the possibilities for eventual deconcentration may be diminished", ¶ 15(d), provides at best oblique support for adjudication of a potential expander theory. Such "eventual deconcentration" language does not amount to a specific allegation that the acquiring firm was a potential expander; indeed, similar language has been used in Supreme Court and Commission decisions that did not rely upon potential expander evidence or analysis. *See e.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. at 365 n.42; *Liggett & Myers, Inc.,* 81 F.T.C. 1074, 1165 (1976).

plaint counsel were authorized by the Commission to try this case on a horizontal, but not a potential competition, theory of violation. Notwithstanding some precedent to the contrary, any other understanding would have represented a strained interpretation of the reasonably clear meaning and intent of the "actual competition" allegations in the complaint.

As such, when complaint counsel advised the ALJ and respondents' counsel, at the very first prehearing conference, that it intended to prove a violation based on the unpled theory of the loss of potential as well as actual competition, the obligation arose under Rule 3.15 (a)(1) to file a motion for amendment of the complaint which should have been certified by the ALJ to the Commission. **[59]**

In its dual role as prosecutor and judge, the Commission has a special obligation, different from that of ordinary courts of law, to maintain effective control over the purpose, construction, and adjudication of the complaints it issues. Rule 3.15 (a)(1) was placed on the books to facilitate the Commission's exercise of such control. To allow new theories to be added, provided only that the respondent has adequate notice and an opportunity to litigate the issues, would defeat the very purpose of this important safeguard in our rules, and undermine the Commission's control over its prosecutorial discretion.

Fortunately, the constraint on our ability to reach a potential competition theory in this case is immaterial, since the merger does not appear from the record to have substantially lessened potential competition in the COJ industry anyway. While the evidence indicates that Beatrice was interested in expanding its production of COJ for sale to the retail market, and probably would have become a larger competitor in the industry, it falls short of establishing a probability that Beatrice would have gained sufficient market share from the leading firms to deconcentrate the industry or otherwise contribute significantly to a more competitive national market. Though Beatrice increased **[60]** the number of its plants reconstituting COJ from three to twelve between 1975 and 1978, I.D.F. 227, 231, this does not seem to have represented a major corporate commitment to COJ—backed up expanded plant capacity for COJ and big promotional campaigns—that could have resulted in a shake-up of the national market or capture of substantial market share from the market leaders.

In addition, it does not appear that Beatrice's new Dixie Sunshine brand, test marketed briefly before the merger and abandoned shortly thereafter, would have become the major, nationally sold product that would have vaulted Beatrice into the big time in this industry. Despite some evidence cited by complaint counsel to the contrary, there were formidable commercial obstacles to the accomplishment of long-range, nationwide distribution of this product from its planned pro-

cessing center in Orange City, Florida. Dixie Sunshine was a "fresh" juice, and Beatrice lacked the supply and special freezing facilities necessary to large-scale production and distribution of a fresh COJ product from the Orange City plant, which also happened to be a financially unstable operation with an uncertain future. Further, there is very little evidence that Dixie Sunshine ultimately would have been reconstituted and sold nationally through Beatrice's milk plant system, as complaint counsel claimed, or that Beatrice's plant managers were even interested in distributing the new product. The weight of the evidence, viewed in light of these commercial realities, is that absent the merger, Dixie Sunshine would have been sold primarily [61] as a fresh product, packaged in Florida and limited in distribution principally to the southeast.

C. *Entrenchment Effects*

The ALJ found that the merger had the anticompetitive effect (as alleged in paragraph 15 (b)-(d) of the complaint) of entrenching Tropicana as the market leader. While he rejected complaint counsel's entrenchment theory that the acquisition conferred special advertising advantages on Tropicana through access to Beatrice's considerable advertising assets, he agreed that it did confer special advantages in distribution through access to Beatrice's milk plant network that would strengthen Tropicana's market position in the west and thereby entrench its position nationally. I.D. 65–66. Underlying this conclusion were the ALJ's findings that Tropicana was searching for a more economically efficient way than shipments from Florida to penetrate the western market, that the industry trend of reconstituting at plants closer to the retail destination was the most economical way to do it, and that access to Beatrice's plants assured the attainment of its western expansion plans. I.D.F. 293–302; I.D. 66–67. While entrenchment can be an independent basis of antitrust liability,[75] the record does not support the ALJ's conclusion that the distributional advantages resulting from the merger were likely to entrench Tropicana in violation of Section 7. [62]

First, we affirm the ALJ's findings that the record proves no *unique* advertising efficiencies to the merged firm that are a direct consequence of the acquisition. With respect to the alleged competitive advantage in distribution, we agree with the ALJ that the acquisition would appear to enable Tropicana to expand substantially in the west by using Beatrice's dairy plants as distribution or reconstituting centers. However, the record fails to establish that Tropicana had plans to integrate the Beatrice milk plant network for this purpose following the merger. There is little evidence that Tropicana was prepared

[75] *Heublein*, 93 F.T.C. at 592, citing *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

to abandon its historical commitment to marketing a fresh glass product even though the industry trend was toward lower-cost reconstituting and Tropicana had made some movement itself in that direction.[76] A continuing primary commitment by Tropicana to its fresh glass product and its premium image could explain the absence—at least so far—of integration of the reconstituting facilities of Beatrice's plants into Tropicana's COJ business. Moreover, even if Tropicana eventually did use Beatrice's distributional resources for the purpose of making a reconstituted Tropicana product and achieving greater inroads in the west, the record does not support a finding that that would necessarily result in a substantial lessening of competition in the national COJ processing and reconstituting market. In view of the growth in demand for COJ, the ongoing expansion by Minute **[63]** Maid as well as major regional reconstituters in response to that demand,[77] and the general case of entry (at least on a small scale), it is at least questionable whether even full utilization of Beatrice's distribution system by Tropicana would have the effect of significantly raising barriers to entry or expansion or otherwise substantially decreasing competition in the national COJ processing and reconstituting market. Finally, the post-acquisition stabilization and recent decline of Tropicana's market share do not bear out complaint counsel's prediction, made in support of its entrenchment allegation, CAB 56, that the merger would increase both Tropicana's dominant market share and industry concentration.

In *Heublein* we said that because "adverse competitive effects from 'entrenchment' can be rather elusive, it is particularly important that a factual basis be carefully constructed." *Id.* at 593. That predicate has not been established here.

CONCURRING OPINION OF COMMISSIONER DOUGLAS[1]

I concur in the result that the majority reach in this case. However, I am troubled by portions of the majority opinion, including the product and geographic market discussions. This concurring opinion summarizes the most important of those concerns.

Relevant Product Market

As the majority opinion recognizes, cross-elasticities of demand and supply are important determinants of the relevant product market.

[76] In fact, Tropicana's commitment to its fresh product would appear to have been reaffirmed by its completion of a new $16 million glass factory in 1978. Tr. 3784, 3915–16.

[77] Along with Minute Maid, such significant reconstituters as Johanna Farms, Home Juice and Ohio Pure Foods all grew after the merger and anticipate more expansion. RR 30; Tr. 1603, 1607. Further, economist Tilley conservatively estimated industry growth at 50% over the next 5 years. Tr. 2348–49.

[1] Chairman James C. Miller, III joins in this concurring opinion.

A universe can be characterized as a separate product market if—within an appropriate period of time—a small change in the price of products within the universe does not induce significant changes in the quantities of products outside the universe that are demanded or supplied.[2] Of course, it may sometimes be difficult to develope the empirical data needed to measure these factors in particular cases. Nevertheless, they provide the theoretical basis for product market definition. [2]

In this case, the majority opinion concludes that the relevant product market includes chilled orange juice (COJ), but does not include frozen concentrated orange juice (FCOJ).[3] I disagree with this conclusion. The majority opinion also recognizes that including or excluding FCOJ in or from the relevant product market does not affect the outcome of the case.[4] Nevertheless, I believe that accurate market definition should be an important part of merger cases, and that the record evidence on cross-elasticities of demand and supply is sufficiently clear in this case to establish that FCOJ should be included in the relevant product market.

Cross-Elasticity of Supply

The record evidence suggests that the cross-elasticity of supply between FCOJ and COJ is high.[5] Since COJ can be produced from fresh oranges, from bulk concentrate (FCOJ) or from bulk frozen single strength juice,[6] any firm that can produce or purchase bulk concentrate can sell both FCOJ [3] and COJ.[7] Moreover, much of the equipment used to produce COJ directly from oranges can also be used to

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[2] *FTC Statement On Horizontal Mergers* (June 14, 1982), *reprinted in* 42 ATRR Special Supplement (June 17, 1982) (hereinafter cited as *FTC Statement*), at S–15; *Justice Department Merger Guidelines* (June 14, 1982), *reprinted in* 42 ATRR Special Supplement (June 17, 1982) (hereinafter cited as *DOJ Guidelines*), at (S-3) - (S-5). The Justice Department suggests that, as a first approximation, the test of the viability of a prospective market should be whether a 5% price increase for products in that market would induce—within one year—a significant percentage of buyers of products already included in the market to shift to other products not yet included in the market. *DOJ Guidelines, supra*, at S–4.

[3] Majority opinion at 25.

[4] *Id.* at 15.

[5] The respondents did not press this argument on appeal. However, that does not foreclose the Commission from considering the record evidence on this important issue *sua sponte*.

[6] I.D.F. 63. The majority opinion treats COJ made from fresh oranges and COJ made from concentrate as part of the same product market. Majority opinion at 14 n. 16.

[7] For example, Minute Maid began producing COJ after becoming the leading processor of FCOJ. Majority opinion at 7 n. 6. It should also be noted that the hundreds of dairies operating nationwide can easily switch from fluid milk production to COJ production. *See* note 29 and accompanying text, *infra*.

The packaging equipment needed to produce COJ and FCOJ differs, because FCOJ is typically sold in small cardboard cans, while COJ is sold in cartons, plastic containers, or glass containers. I.D.F. 51. However, the equipment needed to manufacture the different containers is apparently widely available and not particularly expensive. Moreover, producers can purchase the finished containers from specialized manufacturers—or set up co-packing arrangements with firms that already have the necessary equipment—if they wish to do so. For example, Kraft presently has a co-packing agreement with Sunkist, under which Sunkist processes and packages approximately 10% of Kraft's juice, and Kraft then distributes it under its own label. Majority opinion at 18 n. 22.

produce COJ from bulk concentrate.[8] Furthermore, there are a number of processors in Florida, including grower cooperatives, that currently have all the equipment needed to process oranges into COJ or FCOJ and can change their capacity from one to the other as a function of the relative profitability of each form.[9] As a consequence, the evidence indicates that FCOJ producers would encounter relatively little difficulty in shifting to COJ production in response to higher and more profitable COJ prices. It would not be as easy for COJ producers to switch to the production of FCOJ, [4] because different equipment is required. However, the crucial issue in treating COJ as a separate market is whether an increase in COJ prices and profitability could be expected to induce FCOJ producers to divert any productive capacity from FCOJ to COJ. The record evidence indicates that they could do so easily.

Cross-Elasticity of Demand

Intuitively, one would expect demand for FCOJ and COJ to be highly correlated because of their highly similar taste and use characteristics. Most COJ is produced from bulk concentrate and therefore tastes exactly like the orange juice that consumers themselves prepare from frozen concentrate. Moreover, as the majority opinion apparently suggests, COJ made from fresh oranges and COJ made from bulk concentrate should both be included in the relevant product market, in part because consumers apparently perceive little or no difference in taste between them.[10] It therefore seems illogical to treat COJ made from fresh oranges and COJ made from frozen concentrate as part of the same market while excluding frozen concentrate itself from that market. The only apparent differences between COJ and FCOJ relate to storage and preparation. COJ can be stored for twenty to thirty days in a refrigerator, while FCOJ occupies less space and can be stored indefinitely. In addition, COJ is ready to serve, while FCOJ must be thawed and diluted. These differences hardly seem sufficient to justify placing COJ and FCOJ in separate markets. [5]

The pricing evidence in the record does not refute this intuitive judgment. As the majority opinion recognizes, FCOJ and COJ prices do not differ dramatically. As of August 1, 1979, the average nationwide price of a six ounce serving of FCOJ was only 14 percent lower than the average price of an equivalent serving of chilled orange juice packaged in cartons or plastic.[11] That represents a considerable re-

[8] I.D.F. 67. Tropicana, for example, makes 70% of its COJ directly from fruit, and the remaining 30% from bulk concentrate. I.D.F. 65. Similarly, Hood and Kraft make COJ from both fresh oranges and FCOJ. I.D.F. 66.

[9] CX 594I,J,K,O,R; Tr. 902–04, 1287–89, 1418–19, 1543, 1668–71, 3899, 3904–07.

[10] Majority opinion at 14 n.16, *citing* I.D.F. 63–70.

[11] CX 560T (*in camera*). Over two-thirds of all COJ is sold in plastic containers or cartons. CX 560z–4 (*in camera*).

duction from the 32 percent price disparity recorded in 1970.[12] Moreover, during the 1971 – 1979 time period, the ratio of total ready-to-serve orange juice sales to total frozen concentrate sales increased from less than 25 percent (in gallons) to over 50 percent (in gallons).[13] This evidence is consistent with the inference that price competition between COJ and FCOJ has strengthened considerably since 1971.[14] The record does not contain any evidence [6] on current FCOJ and COJ prices with which we could determine whether this trend has continued, but there is no reason to believe that it has weakened or ended.

One study submitted by complaint counsel (the Tilley study) provides more direct evidence on the issue of demand cross-elasticity. The study's principal objective was to determine the degree to which COJ and FCOJ consumption can be explained by habit and inventory effects. As a corollary to the effort, the study produced a number of demand cross-elasticity estimates. The Tilley study represents a professional and sophisticated statistical effort, and I should like to emphasize that well formulated statistical evidence can be of substantially greater importance in delineating relevant markets than the anecdotal type of "industry or public recognition" evidence suggested in *Brown Shoe Co. v. United States.*[15] However, the results of the Tilley study raise several concerns that limit its utility in determining whether COJ and FCOJ lie in the same or in separate markets.

The first concern relates to the data upon which Dr. Tilley relied. The price and quantity data were based upon beverage purchase reports from a consumer panel.[16] [7] However, Douglas Hoffer, the Director of Marketing for the Florida Department of Citrus (and formerly its Director of Market Research), testified that he did not believe that the data were particularly reliable.[17] Possibly as a consequence of his testimony, complaint counsel declined to introduce the data themselves into evidence as a basis for establishing prices and price trends.[18] Moreover, apparently as a result of these reliability problems, the Department of Citrus later stopped purchashing the

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[12] CX 560T (*in camera*).

[13] CX 560W (*in camera*).

[14] It is true that the price of FCOJ remains considerably lower—approximately 29 percent lower—than the price of COJ in *glass* containers. CX 560T (*in camera*). However, as the majority opinion points out, the disparity between the price of COJ in glass containers and the price of COJ in plastic containers or cartons is actually greater than the disparity between the latter and the price of FCOJ. Nevertheless, the majority opinion treats COJ sold in glass containers and COJ sold in plastic containers or cartons as part of the same product market. Majority opinion at 11–14.

[15] 370 U.S. 294, 325 (1962).

[16] Tr. 1990, *referring to* CX400 through CX407.

[17] Tr. 1886–87, 1927. The Administrative Law Judge later characterized this opinion as "very persuasive." Tr. 2221.

[18] Tr. 1888. Complaint counsel did offer the data for the purpose of showing that they were categorized on the basis of beverage type—rather than "for the truth of the price-trend data contained therein"—and the Administrative Law Judge accepted them for that limited purpose only. Tr. 1888–89.

data.[19] The Tilley study results may therefore have been affected by inaccuracies in the data base.

Second, the study results may have been affected by multicollinearity problems, which can cause substantial errors in the regression estimates that a study produces.[20] If several independent variables tend to move together, it is difficult to determine whether the value of a given coefficient for any one of those variables actually measures [8] the effect of that variable (*e.g.,* the cross-elasticity of demand between FCOJ and COJ), or instead simply reflects the strong influence of other related independent variables. Dr. Tilley agreed that multicollinearity might have affected his regression estimates, and that if he had limited the number of substitutes in his study to chilled, frozen, and canned juice, his study might have established a greater degree of substitutability among the three.[21]

Third, the study results may have been affected by serial correlation. The system of equations Dr. Tilley employed includes the quantity of each product consumed in the immediately preceding period as an independent variable. Since, for each time period, quantity serves as the dependent variable while prices serve as the independent variables, including the immediately preceding quantity as an additional independent variable makes each quantity observation a function not only of *current* prices but also of all *previous* price observations. This technique may introduce serial correlation into the dependent variable, further affecting the accuracy of the regression estimates. The study results [9] do indicate that both FCOJ and COJ consumption in any given period were strongly influenced by the quantity of each product consumed in the immediately preceding period.[22]

Apart from these systematic difficulties, the cross-elasticity coefficients generated by the study are themselves not inconsistent with treating COJ and FCOJ as part of the same market. For example, in the first relevant equation, which regresses per capita consumption of COJ on the prices of FCOJ and other types of orange juices and orange drinks, the study found a cross-elasticity of demand of -0.0633 between FCOJ and COJ.[23] Because of its high standard error, this value is not significantly different from zero. Zero would be the expected value if the demands for the two products were completely independent from each other. However, the fact that the statistical

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[19] Tr. 2382.

[20] J. Kmenta, *Elements of Econometrics* 380–91 (1971).

[21] Tr. 2144–47.

[22] CX 514I. The study also generated some anomalous results. For example, it indicates that the cross-elasticity of demand between the price of canned single strength orange juice (CSSOJ) and per capita consumption of FCOJ is negative and significantly different from zero at the 90% level. *Id.* This suggests that CSSOJ and FCOJ are actually complements; that is, when the price of CSSOJ increases, FCOJ consumption declines. This result does not make particularly good sense, and suggests that the study may suffer from some specification problems.

[23] CX 514I.

test failed to *reject* the null hypothesis does not allow one to conclude that the null hypothesis is true and that the [10] cross-elasticity of demand must be zero.[24] In other words, the statistical finding is consistent with—but does not prove—the hypothesis that demand for the two products is independent.

In the second relevant equation, which regresses per capita consumption of FCOJ on the prices of COJ and other types of orange juices and drinks, the study found a cross-elasticity of 0.2267 between FCOJ and COJ.[25] This result is significantly different from zero at the 90% confidence level.[26] Therefore, as Dr. Tilley testified, one can have a

fairly high level of confidence, above 90 percent, that COJ is in fact a substitute for FCOJ.[27] [11]

Moreover, the true value of the short-run cross-elasticity measure may actually be as high as 0.4346, and in any event no lower than 0.0188.[28]

It is difficult to determine precisely how to evaluate the Tilley study results. The cross-elasticity estimates the study produced are not particularly high, but the data reliability, multicollinearity, and serial correlation concerns described above limit the utility of the estimates. Moreover, the estimates themselves focus upon short-run effects, and although the study did not produce any long-run cross-elasticity estimates, it does indicate that the long-run price elasticities of demand for FCOJ (-0.8589) and COJ (-0.8474) are nearly identical, and considerably higher.[29] These conflicting considerations suggest that on balance, the Tilley study—although a professional effort—cannot be relied upon to determine the degree to which FCOJ and COJ can be treated as substitutes. [12]

By contrast, two New York studies submitted by the respondents suggest a substantial degree of substitutability or cross-elasticity between COJ and FCOJ.[30] As the majority opinion points out, the New York studies are regional rather than national in scope. However,

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[24] *See, e.g.*, R. Wonnacott and T. Wonnacott, *Econometrics* 64–66. (1970).

[25] CX 514I.

[26] The absolute value of the ratio of the observed value (here, 0.2267) to its standard error (here, 0.1225) determines the degree to which one can be confident that the value of the coefficient actually differs from zero. When the number of observations exceeds 30, as is the case here, then a ratio of 1.697 permits one to be 90% confident that the value actually differs from zero. Since the ratio of the observed value (0.2267) to its standard error (0.1225) exceeds 1.697, one can be over 90% sure that the actual value of the variable is positive and different from zero.

[27] Tr. 2384.

[28] These figures represent the bounds of the 90% confidence interval. That interval can be created by respectively adding and subtracting the product of the standard error (here, 0.1225) and 1.697 to and from the observed value (here, 0.2267).

[29] CX 514K. The "long run" for FCOJ and for COJ were estimated to be 8 months and 5 months, respectively.

[30] Because the New York studies were prepared by the same firm that collected the data that Dr. Tilley relied upon and, presumably, relied upon the same type of data, their utility may be similarly limited.

since COJ accounts for a greater proportion of orange juice sales in New York than in other parts of the country, one might actually expect the New York studies to show a lower degree of substitutability of FCOJ for COJ there than elsewhere. That did not prove to be the case. One of the studies found a substantial level of substitution between Minute Maid and Tropicana COJ, on the one hand, and a variety of brands of FCOJ, on the other.[31] The second study indicated that Minute Maid FCOJ buyers devote 27 percent of their purchases (in fluid ounces) to brands of COJ; that Minute Maid COJ buyers devote 39 percent of their purchases to brands of FCOJ; that Tropicana FCOJ buyers devote 23 percent of their purchases to brands of COJ; and that Tropicana COJ buyers devote 45 percent of their purchases to brands of FCOJ.[32] In short, the New York studies suggest that there may be a substantial degree of substitutability between FCOJ and COJ. **[13]**

Industry Perceptions

The record evidence concerning industry perceptions appears to be rather inconclusive. As the majority opinion recognizes, industry perceptions can sometimes help to delineate the relevant product and geographic markets. However, in this case the perceptions of different industry participants conflict substantially,[33] and it is difficult to determine which should be relied upon and which should be ignored. Moreover, the fact that some industry firms consider COJ and FCOJ to differ from one another to some degree does not mean that they should be treated as separate products. The crucial issue is whether the price of one could be increased significantly without inducing increases in the quantities of the other that are demanded and supplied. The best way to resolve conflicting industry perceptions is to consider the more objective and reliable evidence provided by cross-elasticities of supply and demand.

Conclusion

The record evidence indicates that the cross-elasticity of supply between COJ and FCOJ is relatively high, and that the cross-elasticity of demand between the two versions of orange juice may be at least somewhat significant. As a result, any effort to raise COJ prices to a significant degree could be expected to induce FCOJ producers to increase **[14]** COJ production substantially, and to induce at least some COJ consumers to switch to FCOJ. I would therefore treat FCOJ and COJ as part of the same product market.

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[31] RX 1–p, 1–q.

[32] RX 1–3–91.

[33] *Compare, e.g.,* CX 6C, CX 147, CX 149B–C *with* Tr. 4328, 4479, 4877, 5107, RX 120–T.

Relevant Geographic Market

The majority opinion concludes that the relevant geographic market in this case is the nation as a whole. However, the opinion also states that "it is quite possible that regional markets could also exist which would reflect, perhaps more precisely, the commercial realities of the COJ industry and the competitive effects of the merger . . .," and that "regional shipping restrictions . . . strongly suggest the existence of regional markets as well . . ."[34] Together, these statements suggest that the relevant markets in this case can be both regional and national simultaneously. I disagree with this approach. I believe that carefully delineating the single most accurate geographic market possible should be a prerequisite to evaluating the competitive effects of any given merger. I would therefore simply conclude that in this case, the nation as a whole represents the most competitively significant market within which to assess the effects of the acquisition at issue.

The relevant geographic market can be delineated most accurately by calculating the degree to which—within an appropriate period of time—price changes in a given area **[15]** will induce changes in the quantities of the relevant product supplied from and demanded in other areas. This suggests that geographic markets—like product markets—can be visualized as a series of concentric circles radiating outward. As the diameter of the circle expands, the cross-elasticities of demand and supply between the relevant product within the circle and the relevant product outside the circle can be expected to decline.

In this case, the record evidence establishes that the three largest producers, Tropicana, Minute Maid, and Kraft, all sell their products on a nationwide basis, and monitor and respond to prices and other competitive conditions that prevail in different parts of the country. Moreover, they compete directly with large numbers of local and regional producers. Furthermore, although transportation costs apparently represent a significant proportion of product value, they do not regionalize competition to any significant extent. Approximately 90 percent of the product—in the form of fresh oranges, chilled juice, or bulk concentrate—must be shipped from Florida.[35] It is therefore highly unlikely that any national, regional, or local producer would have a significant freight advantage over any other.[36] **[16]** As a result of these market characteristics, any effort to increase prices significantly above the competitive level in a given part of the country can

[34] Majority opinion at 32, 34.

[35] The remaining ten percent comes from the Southwest, Brazil, and Mexico. Majority opinion at 4.

[36] Since bulk concentrate is more concentrated than fresh oranges or chilled juice, it may be more economical to ship on a per pound basis. However, it must be kept frozen, unlike fresh oranges or chilled juice, and that may conversely increase its shipping costs relative to the other two product forms.

be expected to induce increased shipments of the product from other parts of the country relatively quickly. I would therefore conclude that the relevant geographic market is the nation as a whole, and dispense with the suggestions in the majority opinion that the relevant geographic markets in this case may be both national and regional simultaneously.

Competitive Effects

If the product market is defined to include both chilled orange juice and frozen concentrate, and if the geographic market is defined to be nationwide, then it is highly unlikely that Beatrice's acquisition of Tropicana had any significant anticompetitive effects. Market share data strongly support this conclusion. In 1978, Tropicana and Beatrice respectively accounted for approximately 11 percent and 0.0016 percent of sales in the relevant market.[37] These shares are considerably lower than the shares that Tropicana and Beatrice respectively accounted for in the [17] chilled orange juice sector alone, according to the majority opinion.[38] Industrywide concentration levels in the larger FCOJ-COJ market probably are also considerably lower, because Tropicana's share of sales in the larger market is only one-third as large as its share in the COJ sector alone.[39] The majority opinion concludes that—in conjunction with other evidence—the market share and concentration levels in the COJ sector establish that the merger is unlikely to have any anticompetitive effects. The much lower share and concentration levels in the more relevant product market that includes both COJ and FCOJ make it substantially less likely that the merger would have any anticompetitive effects.

Other relevant economic factors strengthen this determination even further. As the majority opinion points out, small-scale entry into the chilled orange juice sector is both easy and common.[40] I would also conclude—unlike the majority opinion—that large-scale entry into the larger, more relevant market would not be particularly difficult. Any dairy—including the very large regional dairies with well-established trademarks located throughout the country—can quickly and inexpensively shift from [18] fluid milk production to chilled orange juice production, because their fluid milk plants already possess all the production and distribution equipment needed to produce

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[37] These estimates are necessarily approximate; they were derived as follows. In fiscal 1978, Tropicana and Beatrice respectively accounted for $166.8 million (I.D.F. 123) and $2.4 million (Majority opinion at 4) in sales of chilled orange juice to the retail sector. Total chilled orange juice sales in that sector amounted to $545.2 million. I.D.F. 121. Total non-institutional sales of FCOJ amounted to approximately $1.05 billion in fiscal 1978. *Federal Trade Commission v. Beatrice Foods Co.*, 587 F.2d 1225, 1233 (D.C. Cir. 1978). Total non-institutional sales of FCOJ and COJ therefore together amounted to approximately $1.5 billion, yielding the market shares cited above.

[38] Majority opinion at 43.

[39] The record does not include market share data for any of the four largest firms in the FCOJ-COJ market except Tropicana (which apparently makes almost no FCOJ sales).

[40] Majority opinion at 46.

chilled orange juice from bulk concentrate.[41] Large-scale new entry into the industry therefore would probably not be particularly difficult. In fact, a number of strong regional firms have recently entered the orange juice industry on a substantial scale.[42]

Conclusion

The record evidence establishes that the merger would be unlikely to have any anticompetitive effects in the nationwide market for chilled and frozen concentrated orange juice. I therefore concur that the complaint in this matter should be dismissed. I would like to emphasize that my conclusion in this regard would be the same if I were to accept the narrower product market definition in the majority opinion. Moreover, it would almost certainly be the same if we were today considering a complaint proposal rather than a final disposition. It is interesting to note that the complaint in this matter alleged almost precisely the same facts that the majority opinion now relies upon to dismiss the proceeding. In particular, the complaint alleged that [19] the relevant product and geographic markets consisted of "the processing, distribution and sale of ready to serve orange juice . . . . [in] the United States as a whole and submarkets thereof. . . ." The complaint also alleged that the four largest firms in the market accounted for 58.6% of total sales in that market in 1976, that Tropicana and Beatrice respectively accounted for 29% and 1% – 1.7% of total unit volume (in gallons) in 1976, and that Tropicana's share was nearly twice that of its nearest competitor.[43] The Commission relied upon these allegations to issue the complaint in this matter. The majority opinion now relies upon essentially the same market definitions, determines that concentration levels and the market shares of Tropicana and Beatrice within those alleged markets are roughly the same, and nevertheless concludes that the acquisition did not injure competition. This change in perspective illustrates the Commission's growing understanding that economic characteristics other than market shares and concentration levels are crucially important to determining whether any particular acquisition is likely to injure competition. I welcome the majority opinion's recognition of that fact, and I look forward to applying these principles both to future cases and to future proposals for complaints alleging violations of Section 7 of the Clayton Act.

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[41] I.D.F. 135. The only conceivable constraint to shifts of this sort would be access to bulk frozen concentrate.

[42] These firms include Johanna Farms on the Atlantic Coast, the Ohio Pure Foods Co. and the Home Juice Co. in the Midwest, and Knudsen Dairy on the West Coast. Tr. 994, 1018–19, 1029–30, 1094, 1591, 1603, 1607, 4053–56.

[43] *Beatrice Foods Co.*, Docket No. 9112 (Complaint) (Issued on June 29, 1978), at 3.

Final Order

This matter has been heard by the Commission upon the appeal of respondents from the initial decision and upon briefs and oral argument in support of and in opposition to their appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondents' appeal. All motions which have not yet been disposed of in the accompanying Opinion or by prior orders of the Commission are denied. Accordingly,

It is ordered, That the complaint is dismissed.

IN THE MATTER OF

STIHL, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9165. Complaint, March 7, 1983—Decision, June 6, 1983

This consent order requires a manufacturer and seller of power tools and its advertising agency, amonth other things, to cease representing that the Stihl 015 AV chain saw has been top-rated by a leading consumer publication; that power was one of the factors considered in the rating; and that Stihl chain saws start faster and run smoother than other chain saws. The order prohibits respondents from making false or unsubstantiated representations concerning the performance or durability of any power tool, and requires them to possess and rely upon a reasonable basis when making such claims. Further, the companies are barred from misrepresenting the purpose or conclusion of any test or evaluation, and are required to retain documentation for performance-related claims for a period of three years.

Appearances

For the Commission: *Andrew Sacks* and *T. Bringier McConnell.*

For the respondents: *William I. Bandas,* Richmond, Va. and *Stephen Wainger, Seawell, Dalton, Hughes & Timms,* Norfolk, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stihl, Inc., a corporation, and Stuart Ford, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stihl, Inc. ("Stihl"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its office and principal place of business is located at 536 Viking Drive, Virginia Beach, Virginia. Respondent Stuart Ford, Inc. ("Stuart Ford"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its office and principal place of business located at 1108 E. Main Street in Richmond, Virginia.

PAR. 2. Stihl is now and at all times relevant to this complaint has

been engaged in the marketing and sale of chain saws and other power tools, and power tool accessories. Stuart Ford is an advertising agency and has prepared, created and placed advertisements for Stihl chain saws and other Stihl power tools.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional material, including but not limited to, the advertising referred to herein, to promote the sale of Stihl chain saws and other Stihl power tools.

PAR. 4. Respondents maintain and have maintained a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, and for the purpose of promoting the sale and distribution of Stihl chain saws, respondents have disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and in television stations located in various states, having sufficient power to carry such broadcasts across state lines.

PAR. 6. Typical statements and representations in said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits A, B, C, D, and E.

PAR. 7. Through the use of the statements referred to in Paragraph Six and other statements contained in advertisements not specifically set forth herein, respondents have represented, and now represent directly or by implication, the following claims:

a) In 1980 and 1981, the current Stihl model 015 AV chain saw was rated best of all home saws tested by a leading consumer publication; and that "power" was one of the factors considered in this rating.

b) Stihl chain saws start faster than all other chain saws on the market.

c) Stihl chain saws are the smoothest running chain saws on the market.

d) All Stihl power tools last at least twice as long as any other power tool on the market.

PAR. 8. Through the use of the advertisements referred to in Paragraph Six, and other advertisements not specifically set forth herein, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for the representations set forth in Paragraph Eight at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondents did not possess and rely upon a reasonable basis for making such representations, for the following reasons:

a) (1) The test by a "leading consumer publication" was three years old at the time the claim was first made and the results were not properly applicable to the advertised models, because, inter alia, significant changes affecting performance were made in the tested competing saws.

(2) Power was not one of the factors considered in the test.

b) The data which Stihl relied upon do not show that Stihl saws start faster than all other saws on the market.

c) The data which Stihl relied upon do not show that Stihl saws run smoother than all other saws on the market.

d) The data which Stihl relied upon do not show that all Stihl power tools last twice as long as any other power tools on the market.

Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 9. At the time respondents made the representations alleged, respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 10. The representations recited in Paragraph Eight (a), (b) and (c) are false, for the following reasons:

(a) (1) The rating by a consumer publication, published in 1977, did not involve current model chain saws in 1980 and 1981.

(2) The rating by a consumer publication, published in 1977, was not properly applicable to current model chain saws in 1980 and 1981.

(3) Power was not one of the factors considered in the test.

(b) Stihl chain saws do not start faster than all other chain saws on the market.

(c) Stihl chain saws are not the smoothest running chain saws on the market.

As the representations referred to above are false, the advertisements referred to above were therefore unfair and deceptive.

PAR. 11. Respondent Stuart Ford knew or should have known that the aforesaid advertisements were false, and therefore unfair and deceptive.

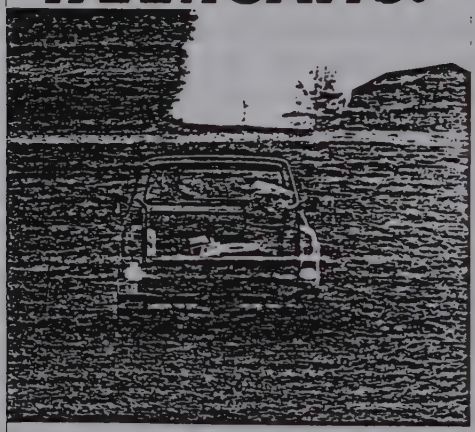
PAR. 12. The use by respondents of the aforesaid unfair and deceptive advertisements and the placement of them in the hands of others who have used them, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said representations are true and complete, and have had the capacity and tenden-

cy to induce such persons to purchase Stihl chain saws by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondents, herein alleged as aforesaid, were and are all to the prejudice and injury of the public, and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

FARMERS START BEFORE EVERYONE ELSE. SO DO STIHL FARM SAWS.



Stihl® farm saws are designed to start every time, in sweltering heat or freezing cold. And they last. Not just a season, but year after year.

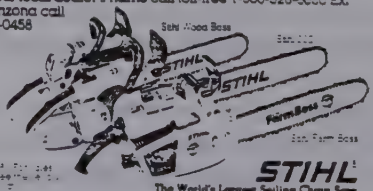
Take the Stihl Farm Boss™, our biggest, most popular farm saw. With high-voltage ignition, a super-efficient combustion chamber and a cooling system that virtually eliminates vapor lock, it has starting power that'll get you going under any cutting conditions.

Or the new 032. Like all our farm saws, it's made to be trouble free. It has longer wearing parts that seldom break down, and automatic oiling so you never have to manually lubricate a chain.

And the Stihl Wood Boss™. It always gets the job done. Because every Stihl is built to last at least twice as long as any other saw you can buy. So for a farm saw you can depend on, get a Stihl. It's the one saw that'll help you get an earlier start.

And an earlier finish.

For your local dealer's name call toll-free 1-800-528-6050 Ext 1430. In Arizona call 1-800-352-0458 Ext 1430



STIHL

The World's Largest Selling Chain Saw.

EXHIBIT B

FARMERS START BEFORE EVERYONE ELSE. SO DO STIHL® FARM SAWS.

Stihl farm saws are designed to start every time, in sweltering heat or freezing cold. And they last. Not just a season but year after year.

Take the Stihl Farm Boss™, our biggest, most popular farm saw. With high-voltage ignition, a super-efficient combustion chamber, and a cooling system that virtually eliminates vapor lock, it has starting power that'll get you going under any cutting conditions.

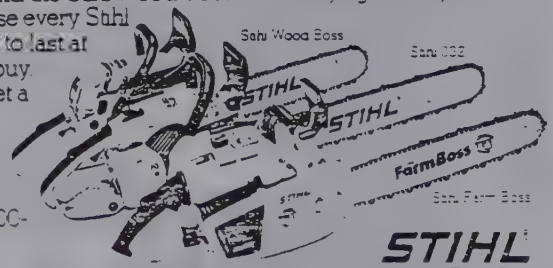
Or the new 032. Like all our farm saws, it's made to be trouble free. It has longer wearing parts that seldom break down, and automatic oiling so you never have to manually lubricate a chain.

And the Stihl Wood Boss™. It always gets the job done. Because every Stihl is built to last at least twice as long as any other saw you can buy.

So for a farm saw you can depend on, get a Stihl. It's the one saw that'll help you get an earlier start.

And an earlier finish.

For your local dealer's name call toll-free 1-800-528-6050 Ext. 1430. In Arizona call 1-800-352-0458 Ext. 1430.



STIHL
The World's Largest Selling Chain Saw.

©Stihl Inc. 1986. For sales and service see the Yellow Pages under "Saws."

EXHIBIT C

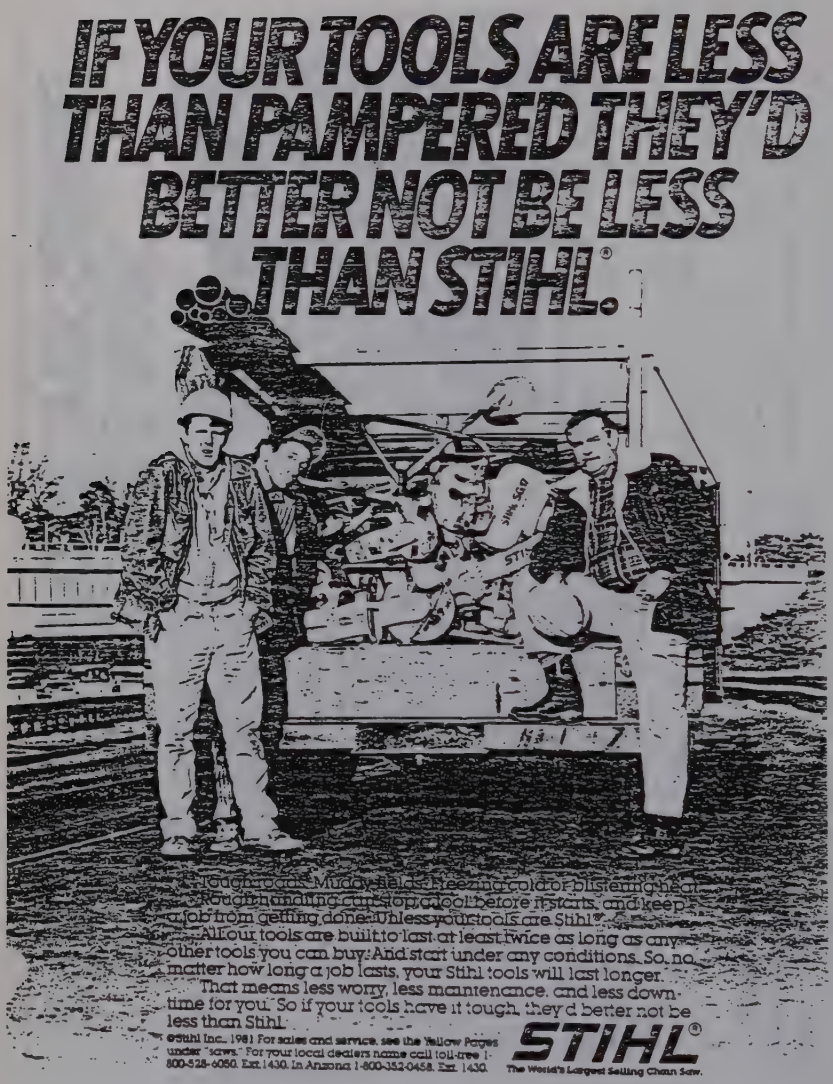

IF YOUR TOOLS ARE LESS THAN PAMPERED THEY'D BETTER NOT BE LESS THAN STIHL®.
Tough tools. Muddy fields. Freezing cold or blistering heat. Rough handling. Cuts up, cool before it starts, and keep a job from getting done. Unless your tools are Stihl®.
All four tools are built to last at least twice as long as any other tools you can buy. And start under any conditions. So, no matter how long a job lasts, your Stihl tools will last longer.
That means less worry, less maintenance, and less down-time for you. So if your tools have it tough, they'd better not be less than Stihl.
©Stihl Inc., 1981. For sales and service, see the Yellow Pages under "saws." For your local dealers name call toll-free 1-800-528-6050. Ext.1430. In Arizona 1-800-352-0458. Ext. 1430.
STIHL®
The World's Largest Selling Chain Saw.

EXHIBIT D

CAN THE WOMAN WHO PICKS OUT YOUR TIES BE TRUSTED TO PICK OUT YOUR CHAIN SAW?

Of course. But unless your lady is a woodcutter, how can she be expected to know that a bargain saw is not necessarily a long lasting one? You can put your mind at ease, if you simply ask her for a Stihl® chain saw.

Stihl is the world's largest selling chain saw because Stihl saws start faster, run quieter and smoother, and hold up longer than other saws.

Each of the over eight thousand Stihl dealers throughout the country services the saws he sells. You won't find that kind of support when your bargain saw quits.

And considering that you get over $45 worth of accessories with the purchase of any 010 or 015 "Bonus Special." Stihl is also capable of cutting a good deal. So, if you want a chain saw for Christmas, you've basically got two choices. Either ask your wife for a Stihl.

Or brace yourself for a bargain.

STIHL®

The World's Largest Selling Chain Saw

BIG DEAL FROM STIHL. With the purchase of any 010 or 015 "Bonus Special" you receive over $45 worth of accessories at participating dealers. Offer includes matching carrying case, spare cutting chain, bar groove cleaning tool, file and handle, wedge, 1 qt. can of engine oil, wrench, owner's manual and owner booklet about firewood cutting. Standard equipment with all Stihl saws.

For your local dealer's name call toll-free 1-800-528-8050 Ext. 430. In Arizona call 1-800-352-1458 Ext. 430. For sales and service see the Yellow Pages under "Saws."

Stihl Inc. 1980

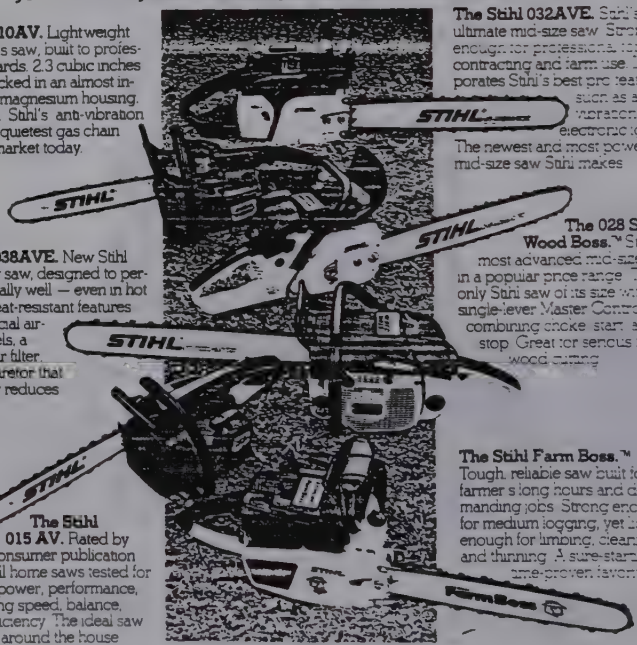
EXHIBIT E

COMPARE THESE TO ANY OTHER SAWS AND LET THE CHIPS FALL WHERE THEY MAY.

Once you know one chain saw from another, you'll know why Stihl® is the largest selling chain saw in the world.

The Stihl 010AV. Lightweight homeowner's saw, built to professional standards. 2.3 cubic inches of power packed in an almost indestructible magnesium housing. Comes with Stihl's anti-vibration system. The quietest gas chain saw on the market today.

The Stihl 032AVE. Stihl's ultimate mid-size saw. Strong enough for professional forestry contracting and farm use. Incorporates Stihl's best pro features such as anti-vibration and electronic ignition. The newest and most powerful mid-size saw Stihl makes.



The Stihl 038AVE. New Stihl pro logging saw, designed to perform especially well — even in hot climates. Heat-resistant features include special air-flow channels, a two stage air filter, and a carburetor that significantly reduces vapor lock.

The 028 Stihl Wood Boss.™ Stihl's most advanced mid-size saw in a popular price range. The only Stihl saw of its size with single-lever Master Control,™ combining choke, start and stop. Great for serious firewood cutting.

The Stihl 015 AV. Rated by a leading consumer publication as best of all home saws tested for combined power, performance, noise, cutting speed, balance, and fuel efficiency. The ideal saw for any job around the house.

The Stihl Farm Boss.™ Tough, reliable saw built for a farmer's long hours and demanding jobs. Strong enough for medium logging, yet light enough for limbing, clearing and thinning. A sure-starting time-proven favorite.

STIHL®

The World's Largest Selling Chain Saw

For the name of the Stihl dealer nearest you, call toll-free 800 528-9050, Ext. 430 in Arizona call 800 352-8458, Ext. 430. Or look in the Yellow Pages under "saws."

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(f) of its Rules;

Now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Stihl, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 536 Viking Drive, in the City of Virginia Beach, State of Virginia. Respondent Stuart Ford, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 1108 East Main Street, in the City of Richmond, State of Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Stihl, Inc., ("Stihl"), and Stuart Ford, Inc., ("Stuart Ford"), corporations, and their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any chain saw for consumer or commercial use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that:

A. (1) The current Stihl model 015 AV chain saw is rated best of all home saws tested by a leading consumer publication;

(2) Power was one of the factors considered in the test by a leading consumer publication.

B. Stihl's chain saws start faster than all other chain saws on the market.

C. Stihl's chain saws are the smoothest running chain saws on the market.

II

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any power tool, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, results, current validity, reliability, or conclusions of any test or evaluation.

III

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any power tool, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representations, directly or by implication,

regarding the performance or durability of any such product unless, at the time the representation is made, respondents possess and rely upon a reasonable basis. For purposes of this Order a reasonable basis shall consist of one or more competent tests or other competent and reliable evidence that substantiates the representation.

Provided, however, That in circumstances where Stuart Ford relied upon scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, which was not directly or indirectly prepared, controlled, or conducted by respondent Stuart Ford, Inc., it shall be an affirmative defense to an alleged violation of Part III of this Order for Stuart Ford to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that it had a reasonable basis in accordance with Part III of this Order. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. Such opinion shall describe the contents of such evidence upon which the opinion is based.

IV

It is further ordered, That respondents, for the period of three years after they last disseminated the advertisements of the products covered by this Order, shall retain all test results, data and other documents or information on which they relied for such advertisements and all documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in respondents' possession during either creation or dissemination of such advertisements. Such records shall be available for inspection by the staff of the Commission upon reasonable notice.

V

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

VI

It is further ordered, That the respondents shall forthwith distribute a copy of this Order to each of its operating divisions, and to each

of its officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements.

VII

It is further ordered, That respondents shall, within sixty (60) days after service of this Order and annually thereafter for three (3) years, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

In the Matter of

HERMAN MILLER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC.2(a) OF THE CLAYTON ACT

Docket C–1248. Consent Order, June 30, 1967—Modifying Order, June 9, 1983

This order reopens the proceeding and modifies the Commission's order issued on June 30, 1967 (71 F.T.C. 1579), so as to allow the company to specify the customers to which its dealers can serve.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JUNE 30, 1967

By a petition dated January 11, 1983, and a supplement thereto dated February 18, 1983, respondent Herman Miller, Inc. ("Herman Miller") requests that the Commission reopen the proceeding in Docket No. C–1248 and delete subparagraphs 1., 2. and 3.(a) of the second unnumbered paragraph of the order issued by the Commission on June 30, 1967 [71 F.T.C. 1579]. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Herman Miller's request and supporting materials, and other relevant information, the Commission now finds that changed conditions of fact and law, and the public interest, warrant reopening and modification of the order.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that subparagraphs 1., 2. and 3.(a) of the second unnumbered paragraph of the Commission's order be, and they are hereby, deleted.

IN THE MATTER OF

CHICAGO METROPOLITAN PONTIAC DEALERS' ASSOCIATION, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE TRUTH IN LENDING ACT

Docket C-3110. Complaint, June 9, 1983—Decision, June 9, 1983

This consent order requires a Wheaton, Ill. Pontiac dealers' association, among other things, to cease failing to make clear and conspicuous credit disclosures in T.V. advertisements promoting consumer credit. The order requires that credit terms be displayed in the video portion of the ad for at least five seconds, and that rates of finance charges be quoted as an "annual percentage rate." The association is also prohibited from using certain credit terms in advertisements promoting credit sales unless those advertisements also include statutorily required information in the manner prescribed by the Truth in Lending Act and its implementing Regulation Z.

Appearances

For the Commission: *George R. Bellack.*

For the respondent: *David G. Mountcastle,* Wheaton, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Chicago Metropolitan Pontiac Dealers' Association, Inc. (hereinafter referred to as "respondent"), a corporation, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 208 North West Street, P.O. Box 48, Wheaton, Illinois.

PAR. 2. Respondent's members are now, and for some time have been, engaged in the business of offering for sale and sale of new and

used automobiles to the public at retail. In the ordinary course and conduct of their business, respondent's members regularly arrange for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Sections 226.2(h) and 226.2(p) of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PAR. 3. In the ordinary course and conduct of its business, respondent caused advertisements, as "advertisement" is defined in Section 226.2(d) of Regulation Z, to be broadcast on television at various times during January and February of 1981. Certain of these advertisements were designed to aid, promote, or assist directly or indirectly the extension of consumer credit by its members, as "consumer credit" is defined in Section 226.2(p) of Regulation Z.

PAR. 4. In certain of the advertisements referred to in Paragraph Three above, respondent used an advertising format in which the credit terms required by Section 226.10(d)(2) of Regulation Z were presented in the video portion of the advertisement. The required disclosures were displayed for an insufficient time for the viewer to read the credit terms, thereby detracting from the clarity and conspicuousness of the required disclosures.

PAR. 5. In certain of the advertisements referred to in Paragraph Three above, the annual percentage rate was not stated as "annual percentage rate," using that term, as required by Section 226.10(d)(1) of Regulation Z.

By means of such advertisements, respondent Chicago Metropolitan Pontiac Dealers' Association, Inc. violated Section 226.10(d)(2) of Regulation Z, which requires credit disclosures to be made clearly and conspicuously, and Section 226.10(d)(1) of Regulation Z which requires the finance charge to be stated as "annual percentage rate", using that term. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondent has violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office

[1] All reference to the Truth in Lending Act and Regulation Z contained in this Complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulations promulgated thereunder and of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 208 North West Street, P.O. Box 48, Wheaton, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I. *It is ordered,* That respondent Chicago Metropolitan Pontiac Dealers' Association, Inc., its successors and assigns, member dealers, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any television advertisement to promote, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601

et seq.,[1] do forthwith cease and desist from:

1. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, unless the following terms are also stated, as required by Section 226.24 (c)(2) of Regulation Z:

(a) the amount or percentage of the downpayment;
(b) the terms of repayment; and
(c) the "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

The terms which are required by Section 226.24(c)(2) of Regulation Z are subject to the general "clear and conspicuous" standard set forth in Section 226.17(a)(1) of Regulation Z and Section 226.24–I of the Official Federal Reserve Board Staff Commentary on Regulation Z.

2. Failing to disclose the terms required by Section 226.24(c)(2) of Regulation Z in the video portion of any television advertisement subject to this order for at least five (5) seconds' duration.

3. Failing in an advertisement which states a rate of finance charge to state the rate as an "annual percentage rate," using that term as required by Section 226.24(b) of Regulation Z.

II. *It is further ordered,* That:

1. Respondent shall distribute a copy of this order to each person having decision-making authority to determine all or part of the contents of an advertisement which is subject to this order, and to the president or chief executive officer of each of respondent's members and shall secure from each such person a signed statement acknowledging receipt of said order.

2. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

3. Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

[1] All references to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980, and Regulation Z as amended to April 1, 1981.

IN THE MATTER OF

THE COMPETITIVE EDGE, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE TRUTH IN LENDING ACT

Docket C-3111. Complaint, June 9, 1983—Decision, June 9, 1983

This consent order requires an Albuquerque, N.M. advertising agency, among other things, to cease failing to make clear and conspicuous credit disclosures in T.V. advertisements promoting consumer credit. The order requires that credit terms be displayed in the video portion of the ad for at least five seconds, and that rates of finance charges be quoted as an "annual percentage rate." The agency is also prohibited from using certain credit terms in advertisements promoting credit sales unless those advertisements also include statutorily required information in the manner prescribed by the Truth In Lending Act and its implementing Regulation Z.

Appearances

For the Commission: *George R. Bellack.*

For the respondent: *Paull Mines, Poole, Tinnin & Martin,* Albuquerque, N.M. and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Competitive Edge, Inc. (hereinafter sometimes referred to as "respondent"), a corporation, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Competitive Edge, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at Number 3 American Financial Center, 2400 Louisiana Boulevard, N.E., Albuquerque, New Mexico.

PAR. 2. Respondent is now, and for some time has been, engaged in the business of creating, producing, and causing dissemination of

advertisements for its clients, as "advertisement" is defined in Section 226.2(d) of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent created, produced and caused the dissemination of advertisements to be broadcast on television at various times during January and February 1981. Certain of these advertisements were designed to aid, promote, or assist directly or indirectly the extension of consumer credit, as "consumer credit" is defined in Section 226.2(p) of Regulation Z.

PAR. 4. In certain of the advertisements referred to in Paragraph Three above, respondent used an advertising format in which the credit terms required by Section 226.10(d)(2) of Regulation Z were presented in the video portion of the advertisement. The required disclosures were displayed for an insufficient time for the viewer to read the credit terms, thereby detracting from the clarity and conspicuousness of the required disclosures.

PAR. 5. In certain of the advertisements referred to in Paragraph Three above, the annual percentage rate was not stated as "annual percentage rate," using that term, as required by Section 226.10(d)(1) of Regulation Z.

By means of such advertisements, respondent, The Competitive Edge, Inc. violated Section 226.10(d)(2) of Regulation Z, which requires credit disclosures to be made clearly and conspicuously, and Section 226.10(d)(1) of Regulation Z which requires the finance charge to be stated as "annual percentage rate", using that term. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with Regulation Z constitute a violation of that Act and, pursuant to Section 108(c) thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regula-

[1] All reference to the Truth in Lending Act and Regulation Z contained in this Complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

tions promulgated thereunder and of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, The Competitive Edge, Inc., is a corporation Organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at Number 3 American Financial Center, 2400 Louisiana Boulevard, N.E., in the City of Albuquerque, State of New Mexico.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I. *It is ordered,* That respondent The Competitive Edge, Inc., its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any television advertisement to promote, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*,[1] do forthwith cease and desist from:

[1] All references to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980, and Regulation Z as amended to April 1, 1981.

1. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, unless the following terms are also stated, as required by Section 226.24 (c)(2) of Regulation Z:

(a) the amount or percentage of the downpayment;
(b) the terms of repayment; and
(c) the "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

The terms which are required by Section 226.24(c)(2) of Regulation Z are subject to the general "clear and conspicuous" standard set forth in Section 226.17(a)(1) of Regulation Z and Section 226.24–1 of the Official Federal Reserve Board Staff Commentary on Regulation Z.

2. Failing to disclose the terms required by Section 226.24(c)(2) of Regulation Z in the video portion of any television advertisement subject to this order for at least five (5) seconds' duration.

3. Failing in an advertisement which states a rate of finance charge to state the rate as an "annual percentage rate," using that term as required by Section 226.24(b) of Regulation Z.

II. *It is further ordered,* That:

1. Respondent shall distribute a copy of this order to the most senior person employed in each of its operating divisions and to each person having decision-making authority to determine all or part of the contents of an advertisement which is subject to this order, and shall secure from each such person a signed statement acknowledging receipt of said order.

2. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

3. Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SCOTT PAPER COMPANY

VACATING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 6559. Modified Order, May 8, 1964—Vacating Order, June 22, 1983*

This order reopens the proceeding and vacates in its entirety the Commission's order issued on May 8, 1964 (65 F.T.C. 638). The Commission has determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding 10 years.

ORDER VACATING CEASE AND DESIST ORDER ISSUED ON MAY 8, 1964

By a petition filed on February 24, 1983, Scott Paper Company ("Scott") requests that the Commission reopen the proceeding in Docket No. 6559 and vacate the order issued by the Commission on May 8, 1964 [65 F.T.C. 638]. Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comments. No comments were received.

Upon consideration of Scott's petition and supporting materials, and other relevant information, the Commission finds that the public interest warrants reopening and vacating the order.

In *Columbian Rope Company,* Docket No. C–1794 [100 F.T.C. 531], the Commission determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The perpetual prior approval provision in this case has been outstanding for 18 years. No particular circumstances warrant an exception from this general policy. Therefore, the Commission, in the exercise of its discretion, finds that it is appropriate to vacate the order.

Accordingly, *it is ordered,* that this matter be, and it hereby is reopened and that the order in Docket No. 6559, issued by the Commission on May 8, 1964, be and it is hereby vacated.

* Original Commission Order issued Dec. 16, 1960 (57 F.T.C. 1415).

IN THE MATTER OF

BORG-WARNER CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 8 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9120. Complaint, Nov. 7, 1978—Final Order, June 23, 1983

This order requires Borg-Warner, an automotive replacement parts manufacturer and its competitors, Bosch GmbH and Bosch U.S., among other things, to cease having interlocking directorates for a period of 10 years. The companies are also prohibited from having on their boards any person who is a board member of a competing company whose revenues derived from the relevant product or service market exceeds 5 million dollars; or any individual who fails to provide the statement required by the order. The order further prohibits Hans L. Merkle from serving as director of both Borg-Warner and any Bosch company that is a competitor of Borg-Warner and requires that the companies institute a monitoring program designed to detect unlawful interlocks.

Appearances

For the Commission: *Ann B. Malester, K. Keith Thurman* and *Sandra G. Wilkof.*

For the respondents: *James M. Johnstone, John B. Wyss* and *Tom W. Kirby, Kirkland & Ellis,* Washington, D.C. and *Charles Houchins,* in-house counsel, Chicago, Ill., for respondent Borg-Warner Corp. *Joseph A. McManus, Susan Rothschild* and *Allen Russell, Coudert Brothers,* New York City, for respondent Robert Bosch Corp. *Werner L. Polak, William M. Kelly* and *Thomas A. Dieterich, Shearman & Sterling,* New York City, for respondents Robert Bosch GmbH, Hans L. Merkle and Hans Bacher.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named Respondents have been, and are, in violation of the provisions of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, issues its complaint, stating its charges as follows:

1. Respondent Robert Bosch GmbH (hereinafter "Bosch GmbH") is a limited liability company organized under the laws of the Federal Republic of Germany and has its principal office at Robert-Bosch-Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germa-

ny. Bosch GmbH has capital, surplus, and undivided profits aggregating more than one million dollars. Bosch GmbH is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its [2] business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Bosch GmbH conducts its business in part through subsidiaries or other operating entities. Bosch GmbH is the parent company of "the Bosch Group," which for purposes of this complaint includes the companies named in Paragraphs 2 through 4.

2. Robert Bosch North America, Incorporated (hereinafter "Bosch N.A.") is a Delaware corporation and has its principal office at 2800 25th Avenue, Broadview, Illinois. Bosch N.A. was organized in January, 1977, for the purpose of managing investments in various corporations. Bosch N.A. owns approximately 10 percent of the stock of Borg-Warner Corporation (hereinafter "B-W").

3. SIBA-Elektric GmbH (hereinafter "SIBA") is a limited liability company organized under the laws of the Federal Republic of Germany and has its principal office at Robert-Bosch-Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germany. SIBA is wholly-owned by Bosch GmbH. SIBA serves as a holding company with investments in various affiliates of the Bosch Group and holds the shares of Bosch N.A. in trust for Bosch GmbH as beneficial owner.

4. Respondent Robert Bosch Corporation (hereinafter "Bosch U.S.") is a New York corporation and has its principal office at 2800 25th Avenue, Broadview, Illinois. Bosch U.S. is wholly-owned, directly or indirectly, and wholly controlled by Bosch GmbH. Bosch U.S. has capital, surplus, and undivided profits aggregating more than one million dollars. Bosch U.S. is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

5. Respondent B-W is a Delaware corporation and has its principal office at 200 South Michigan Avenue, Chicago, Illinois. B-W has capital, surplus, and undivided profits aggregating more than one million dollars. B-W is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [3]

6. Respondent Hans L. Merkle is an individual and resident of the Federal Republic of Germany whose address is Reuerbacher Heide 58, D–7000 Stuttgart 1, Federal Republic of Germany. Dr. Merkle is

chairman of the board of management of Bosch GmbH and a member of the boards of directors of both Bosch U.S. and B-W.

7. Respondent Hans Bacher is an individual and resident of the Federal Republic of Germany whose address is Stuttgarter Strasse 122, D–7250 Leonberg, Federal Republic of Germany. Dr. Bacher is a member of the board of management of Bosch GmbH and a member of the boards of directors of both Bosch U.S. and B-W.

8. On January 11, 1977, Bosch GmbH and B-W signed an agreement whereby Bosch GmbH or its designee would purchase approximately ten (10) percent of the stock of B-W. B-W agreed that its management would recommend to its board of directors that two representatives designated by Bosch GmbH and acceptable to the management of B-W be included in the next proxy statement as nominees for the board of directors of B-W. B-W and Bosch GmbH further agreed that they intend for Bosch GmbH to have two of its designated representatives serving on the board of directors as long as Bosch GmbH or its designee owns nine percent or more of the stock of B-W and one designated representative if Bosch GmbH should own more than five percent and less than nine percent of the stock of B-W.

9. On February 10, 1977, Bosch GmbH wrote B-W that it had designated Hans L. Merkle and Hans Bacher to serve on B-W's board of directors. On February 16, 1977, Bosch N.A. purchased two million shares of B-W, which constitutes approximately ten percent of B-W's stock, for $62,900,000. On or about April 26, 1977, pursuant to the agreement between Bosch GmbH and B-W, Dr. Merkle and Dr. Bacher became directors of B-W.

10. The businesses of both Bosch GmbH and Bosch U.S. include the sale in or affecting commerce of, among other products, automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, hydraulic valves and hydraulic gear pumps and motors. [4]

11. The business of B-W includes the sale in or affecting commerce of, among other products, automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, hydraulic valves and hydraulic gear pumps and motors.

12. Bosch GmbH and B-W, by the nature of their automotive parts business, including ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors, and certain non-automotive business such as hydraulic valves, hydraulic gear pumps and motors and the location of their operations with respect to said products, are competitors of each other.

13. (a) The elimination of competition by agreement between Bosch

GmbH and B-W would constitute a violation of the provisions of the antitrust laws of the United States.

(b) The elimination of competition by agreement between Bosch U.S. and B-W would constitute a violation of the provisions of the antitrust laws of the United States.

14. (a) Dr. Merkle's simultaneous membership on the board of management of Bosch GmbH and the board of directors of B-W constitute violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, B-W and Dr. Merkle.

(b) Dr. Merkle's simultaneous membership on the board of directors of Bosch U.S. and of B-W constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, Bosch U.S., B-W and Dr. Merkle.

15. (a) Dr. Bacher's simultaneous membership on the board of management of Bosch GmbH and the board of directors of B-W constitute violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, B-W and Dr. Bacher. [5]

(b) Dr. Bacher's simultaneous membership on the board of directors of Bosch U.S. and of B-W constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Bosch GmbH, Bosch U.S., B-W and Dr. Bacher.

Initial Decision by

Theodor P. von Brand, Administrative Law Judge

June 30, 1980

Preliminary Statement

The complaint charges that Borg-Warner Corporation (Borg-Warner), Robert Bosch GmbH (Bosch GmbH), Robert Bosch Corporation (Bosch U.S.) and two individuals Hans L. Merkle (Merkle) and Hans Bacher (Bacher) violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

The complaint alleges that Bosch GmbH and Borg-Warner compete in the sale of automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioning compressors, and in non-automotive products such as hydraulic

valves, hydraulic gear pumps and motors.[1]

Two violations are alleged. The first is Dr. Merkle's and Dr. Bacher's membership on the board of management of Bosch GmbH and on Borg-Warner's board of directors. The second violation charged is their simultaneous membership on the board of directors of Borg-Warner and that of Bosch U.S., a subsidiary of Bosch GmbH.

Respondents deny that either statute has been violated on the ground that complaint counsel have failed to establish the elements of a Section 8 violation. Specifically, they contend the record fails to demonstrate competition between Borg-Warner on the one hand and on the other Bosch GmbH and/or the latter's subsidiaries. Respondents urge that even if some competition is proven the competitive overlap is de minimis and not substantial as required by Section 8. Respondents further argue that charges of illegal interlocks based on the individual [3] respondents' positions with Bosch GmbH or on the United States activities of Femsa Inc. must be dismissed since Section 8 applies only to direct competition and not to indirect competition involving a parent or subsidiary of one of the interlocking corporations.

Bosch GmbH, a foreign corporation, contends further that the charges against it cannot be sustained since it is not directly engaged in commerce within the meaning of Section 8 of the Clayton Act. Bosch GmbH contends that the activities of its United States subsidiary are irrelevant to the resolution of that issue.

This matter is now before the undersigned for decision based on the allegations of the complaint, the answer, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

Findings of Fact

I. THE RESPONDENTS

A. *Borg-Warner Corporation*

1. Respondent Borg-Warner Corporation (Borg-Warner) is a Delaware corporation with its principal office at 200 South Michigan Avenue, Chicago, Illinois (Comp. and Borg-Warner's Ans. ¶ 5).

[1] Complaint counsel in the pretrial determined to offer no evidence concerning automotive test equipment and carburetors.

2. Borg-Warner has capital, surplus, and undivided profits aggregating more than $1 million (Comp. and Borg-Warner's Ans. ¶ 5).

3. In 1976, Borg-Warner had worldwide sales of over $1.86 billion (CX 21A). In 1979, its total sales amounted to approximately $3 billion (Trauscht 1063–64).

4. Borg-Warner is a decentralized company, operating through five separate groups, each with various divisions in the following areas, air conditioning, chemicals and plastics, financial services, industrial products and transportation equipment (Trauscht 1063).

5. The automotive parts division and the hydraulics division, which was sold in 1979, belonged to Borg-Warner's transportation equipment group (Trauscht 1067–68; Reichers 621; [4] CX 22). Borg-Warner's York Automotive Division sells automotive air conditioner compressors in the United States (Borg-Warner Ans. ¶ 11; CX 21C).

6. Borg-Warner's business includes the sale of automotive ignition parts, wire and cable parts, carburetor kits, and automotive air conditioning compressors. Until mid-1979, Borg-Warner offered for sale and sold hydraulic valves and hydraulic gear pumps and motors (Comp. and Borg-Warner's Ans. ¶ 11; CX 3A-Z–37, 4A-Z–248, 5A-Z–6, 15A-Z–80, 16A-Z–43; App. B to Int. at 1, 13 *in camera*).

7. Borg-Warner is engaged in commerce as "commerce" is defined in the Clayton Act and is engaged in or its business affects commerce as "commerce" is defined in the Federal Trade Commission Act (Comp. and Borg-Warner Ans. ¶ 5).

B. *Robert Bosch GmbH*

8. Respondent Robert Bosch GmbH (Bosch GmbH) is a limited liability company organized under the laws of the Federal Republic of Germany with its principal office at Robert Bosch Platz 1, D–7016 Gerlingen/Schillerhohe, Federal Republic of Germany (Comp. and Bosch GmbH Ans. ¶ 1).

9. Bosch GmbH is a diversified producer of electric, electronic and mechanical components, systems and products for automotive, consumer and industrial markets including hydraulic equipment (CX 33).

10. Bosch GmbH is engaged in commerce as "commerce" is defined in the Clayton Act and in commerce or affecting commerce as "commerce" is defined in the Federal Trade Commission Act by virtue of the business operations of its subsidiary Bosch U.S. (Findings 33–61).

C. *Robert Bosch Corporation*

11. Respondent Robert Bosch Corporation (Bosch U.S.) is a New York corporation with its principal office at 2800 25th Avenue, Broadview, Illinois (Comp. and Bosch U.S. Ans. ¶ 4; CX 60).

12. Bosch U.S. has capital, surplus and undivided profits aggregating more than $1 million (Comp. and Bosch U.S. Ans. ¶ 4; CX 60).

13. Since its organization in 1953, the capital stock of Bosch U.S. has been owned, directly and indirectly through subsidiaries by Bosch GmbH (Comp. and Bosch U.S. Ans. ¶ 4; Fiene 1323, 1329; Finding 35). [5]

14. The business of Bosch U.S. has included, among other products, the sale of automotive ignition parts, cable sets, and carburetor kits, for imported vehicles and motors only, various hydraulic products including accumulators and piston pumps as well as hydraulic valves, gear pumps and motors (Comp. and Bosch U.S. Ans. ¶ 10; CX 17, 18; Bendixen 897–902; Weisse 1487, 1490, 1502).

15. The bulk of the business of Bosch U.S. is automotive related (Fiene 1336). It also supplies service tools for dealers and independent warehouses for testing purposes, power tools geared to the construction industry, kitchen appliances, hearing aids, packaging machinery, hydraulics, and television studio equipment (Fiene 1336).

16. Bosch U.S. is engaged in commerce as "commerce" is defined in the Clayton Act and is engaged in or its business affects commerce, as "commerce" is defined in the Federal Trade Commission Act (Comp. and Bosch U.S. Ans. ¶ 4).

D. *The Individual Respondents*

17. Respondent Hans. L. Merkle (Merkle) is an individual and resident of the Federal Republic of Germany whose address is Reuerbacher Heide 58, D–7000 Stuttgart 1, Federal Republic of Germany (Comp. and Merkle's Ans. ¶ 6).

18. Dr. Merkle is currently Chairman of the board of management of Bosch GmbH and has been a member of that board since 1958 (Comp. and Merkle's Ans. ¶ 6; Bosch GmbH Int. No. 10).

19. Since 1967 and at all times relevant herein, Dr. Merkle has been a member of the board of directors of Bosch U.S. (Comp. and Merkle's Ans. ¶ 6; CX 59L).

20. On or about April 26, 1977, Dr. Merkle became a member of the board of directors of Borg-Warner (CX 67A-B).

21. Beginning in 1977 and at all times relevant herein, Dr. Merkle served simultaneously on the board of management of Bosch GmbH, the board of directors of Bosch U.S., and the board of directors of Borg-Warner.

22. Respondent Hans Bacher (Bacher) is an individual and resident of the Federal Republic of Germany whose address is Stuttgarter Strasse 122, D–7250 Leonberg, Federal Republic of Germany (Comp. and Bacher's Ans. ¶ 7).

23. Dr. Bacher is currently a member of the board of management

of Bosch and has been a member of that board since 1967 (Comp. and Bacher's Ans. ¶ 7; Bosch GmbH Int. No. 10 at 15). [6]

24. At all times relevant herein, Dr. Bacher was a member of the board of directors of Bosch U.S. (Comp. and Bacher's Ans. ¶ 7).

25. On or about April 26, 1977, Dr. Bacher became a member of the board of directors of Borg-Warner (CX 67A-B).

26. Beginning in April 1977 and at all times relevant herein, Dr. Bacher served simultaneously on the board of management of Bosch GmbH, the board of directors of Bosch U.S. and the board of directors of Borg-Warner.

II. THE STOCK PURCHASE BY BOSCH GmbH OF BORG-WARNER'S STOCK AND THE RELATED AGREEMENT FOR REPRESENTATION OF BOSCH GmbH ON BORG-WARNER'S BOARD OF DIRECTORS

27. On January 11, 1977, Bosch GmbH and Borg-Warner agreed that Bosch or its designee would purchase 2,000,000 shares of Borg-Warner stock representing about 9.5 percent of Borg-Warner's stock for a consideration of $62,900,000 (Comp. and Borg-Warner's Ans. ¶ 8 and 9; CX 59D-E).

28. The two million shares were issued in the name of Robert Bosch North America Incorporated, a Delaware corporation organized in January 1977 which was wholly owned by SIBA-Elektric GmbH, which in turn was wholly owned by Bosch GmbH, which supplied the purchase price for such stock (CX 59; Bosch GmbH Int. No. 12).

29. Borg-Warner agreed that its management would recommend to its board of directors that two representatives designated by Bosch GmbH and acceptable to the management of Borg-Warner be included, in the next proxy statement issued by Borg-Warner, as nominees for election to the board of directors of Borg-Warner (CX 59E, 61A).

30. Borg-Warner and Bosch GmbH further agreed that Bosch GmbH would have two designated representatives serving on Borg-Warner's board of directors as long as Bosch GmbH or its designee owned 9 percent or more of Borg-Warner's stock and one designated representative if Bosch GmbH or its designee owned more than 5 percent but less than 9 percent of Borg-Warner's stock (CX 59F).

31. On February 10, 1977, Bosch GmbH informed Borg-Warner that it had designated Dr. Merkle and Dr. Bacher to serve on Borg-Warner's board of directors (Comp. and Bosch GmbH's Ans. ¶ 9; CX 67A-B). Dr. Merkle and Dr. Bacher were pursuant to such designation elected to Borg-Warner's board of directors and still hold these positions. [7]

32. At the time that Bosch GmbH took an equity position in Borg-Warner, study teams were formed to investigate the opportunities for technical cooperation between the two companies (Weltyk 1281).

III. THE RELATIONSHIP OF BOSCH GmbH AND BOSCH U.S.

33. Bosch GmbH holds itself out as "the parent company of the Bosch Group" (SEC Report filed by Robert Bosch North America Inc., Feb. 23, 1977; CX 59B-C).

34. Bosch GmbH formed Bosch U.S. in 1953 to provide service training and product availability for Bosch GmbH's import customers in the United States (CX 88 at 25).

35. Bosch GmbH and two of its subsidiaries Robert Bosch Internationale and Robert Bosch North America Inc. own the stock of Bosch U.S. (Fiene 1329).[2] Bosch GmbH owns more than 50 percent of the stock of Robert Bosch Internationale and Robert Bosch North America (Fiene 1329). The only function of these two subsidiaries is to act as a holding company (Fiene 1329).

36. The board of directors of Bosch U.S. is elected by the shareholders of that corporation (Bosch GmbH and its subsidiaries in which it holds a controlling interest). Bosch GmbH participates in the selection of the Bosch U.S. board of directors by nominating prospective or current members and by voting the shares it holds in Bosch U.S. (Bosch GmbH Int. No. 9).

37. Bosch U.S. has twelve members on its board of directors, four of them are officers and directors of Bosch GmbH (Fiene 1325–26).

38. Allen H. Russell, a Director and Secretary of Robert Bosch North America, Inc. is also Chairman of the Board of Bosch U.S. (CX 59J, 88 p. 18).

39. Earl R. Fiene, president, chief executive and a board member of Bosch U.S. is also President of Robert Bosch North America (Bosch GmbH Int. No. 18; CX 88 p. 7).

40. Mr. Fiene, the current President of Bosch U.S. in 1973 was employed as a consultant by Bosch GmbH for North American activities to evaluate business opportunities, to involve himself with licensee operations, potential new business [8] ventures, "and also to collaborate with the existing corporation, Robert Bosch Corporation [Bosch U.S.]" (CX 88 p. 6). Mr. Fiene became employed by and assumed his positions as President, chief executive officer and board member with Bosch U.S. in 1974 (Fiene 1320–21).

41. Approximately 100 of Bosch U.S.'s current 1,500 employees are former employees of Bosch GmbH. Such employment is based on "some technical and specialty skills which unfortunately are not available in the local market in many cases" (Fiene 1325).

42. Frederick W. Hohage is a corporate officer of Bosch U.S. (Bosch U.S. Int. No. 8 at 11). He has held the following positions with Bosch

[2] Robert Bosch Internationale holds 51 percent of the stock; Bosch GmbH 42 percent; and Robert Bosch North America 7 percent (Bosch GmbH Int. No. 4).

GmbH and its affiliates in the periods indicated:[3]

	Date
International Sales Promotion Manager	1964
National Sales Manager, Robert Bosch France	1965
Export Manager	1966-68
Delegate to form joint venture	1969
Marketing Staff	1970
Sales Director, Northern Germany	1971
General Manager and Board Member, Robert Bosch Italy	1972-75
President, Chief Executive Officer and Chairman, Robert Bosch (Canada) Ltd.	1979

(Bosch GmbH Supp. Int. No. 8 p. 4–5) [9]

43. Rolf Leeven is a Vice President of Bosch U.S. (Bosch U.S. Int. No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Assistant to Division Director of Finance and Administration	1965-67
Plant Controller, Diesel Manufacturing Plant	1967
Director of Finance and Administration	1967-71
Consulting Director, Corporate Planning and Control	1971-75

(Bosch GmbH Supp. Int. No. 8 p. 5)

44. Guenther Weisse is a Vice President of Bosch U.S. (Bosch Int. No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Engineering employee	1963-67
Commercial employee	1967-68
Manager of Business Planning and Market Development	1968-71

(Bosch GmbH Supp. Int. No. 8 p. 4)

45. Kurt Boehmler is a Vice President of Bosch U.S. (Bosch U.S. Int.

[3] All positions were with Bosch GmbH unless otherwise indicated.

No. 8 p. 11). He held the following positions with Bosch GmbH in the periods indicated:

Planning Engineer	1960-64
Manager, Manufacturing Engineering	1964-69
Technical Works Manager, Motor Industries Co. Ltd.	1969-73
Manager of Engineering	1973-77
Manager, Production and Development	1977-78

(Bosch GmbH Supp. Int. No. 8 p. 5) [10]

Five of the fifteen employees of Robert Bosch North America, a subsidiary holding company of Bosch GmbH and a stockholder in Bosch U.S., are simultaneously employed by Bosch U.S. (CX 88 p. 18–19); the office space of Robert Bosch North America is a "Contiguous part of the overall Robert Bosch Corporation [Bosch U.S.] real estate" (CX 88 p. 19).

46. Bosch U.S. submits financial reports, forecasts, operating results, balance sheets, and business plans to Bosch GmbH (Fiene 1330; Bosch GmbH Int. No. 31 p. 48). The assets and financial results of Bosch U.S. are not reflected on the balance sheet of Bosch GmbH (Bosch GmbH Int. No. 31 p. 48).

47. The total annual dollar volume of sales by Bosch U.S. of products manufactured by Bosch GmbH and the percentage of such sales of Bosch U.S.'s total annual volume of sales was the following:

SALES BY BOSCH U.S. OF BOSCH GMBH PRODUCTS	PERCENTAGE OF TOTAL BOSCH U.S. SALES
1976 – $57,551,000	52%
1977 – 79,637,000	54%
1978 – 86,270,000	50%

(Bosch U.S. Int. No. 31(h) p. 28)

48. Bosch U.S. management has business discussions with Bosch GmbH concerning what products should be introduced in its market (Fiene 1331). On occasion, Bosch U.S. has told Bosch GmbH that the former could not market a product which the parent company had suggested for introduction in the United States (Fiene 1331).

49. Bosch U.S. has negotiated the prices at which it purchased products from Bosch GmbH (Fiene 1333).

50. In the automotive parts area, Bosch U.S. is the largest offshore customer of Bosch GmbH (Fiene 1338).

51. Bosch U.S. has taken on new lines of business not engaged in by Bosch GmbH (Fiene 1331–32). It has also purchased products from sources other than Bosch GmbH for the United States automotive

parts aftermarket in the ignition line. It has made such purchases from other suppliers in the hydraulics area (Fiene 1332).

52. Bosch U.S. is also engaged in the manufacture of electronic control units, starters, alternators and generators [11] (Fiene 1333–34). Prior thereto Bosch U.S. had imported these products from Germany (Fiene 1334).

53. Bosch GmbH has made capital contributions to the business of Bosch U.S. to pay for facilities and machine tools in order to start new programs. Otherwise Bosch U.S., which has a line of credit, obtains capital from domestic sources (Fiene 1335).

54. Bosch GmbH has communicated with Bosch U.S. concerning large capital major proposed expenditures by Bosch U.S. (Bosch GmbH and Bosch U.S. RA 54, 55).

55. Bosch U.S., which is the only firm in the United States licensed to use the trademarks of Bosch GmbH (Bosch GmbH RA 29; Bosch U.S. RA 29), pays royalties to Bosch GmbH for use of the trademarks owned by the latter (Bosch GmbH Int. No. 31j).

56. In hydraulics sales to Massey Ferguson, Bosch U.S. and Bosch GmbH collaborate on engineering and specification requirements as well as on the applications. Such collaboration "is tied into, again, [the] Bosch relationship worldwide with Massey Ferguson, trying to achieve uniform application and interchangeability, such as Brazil and Europe" (CX 88 pp. 35–36).

57. A Borg-Warner official, William H. Weltyk, Vice President of Engineering, reported in pertinent part concerning a visit to Bosch GmbH in Stuttgart, Germany in Feb. 3–6, 1976:

> *We then met with Mr. Hertz who is in charge of the aftermarket outside of Europe. We talked in particular about Bosch's aftermarket activities in the United States which is headquartered in Chicago.* Their aftermarket group employs about 800 people and they have offices in New York, San Francisco and Houston. They have direct sales to 4 classes of trade: to warehouse distributors, to foreign vehicle distributors, to mass merchandisers and to outlets which specialize in diesel engines. In total, Bosch has about 1,000 direct accounts. Their primary products are spark plugs, starters, alternators (which are mainly rebuilt), ignition parts and electronic fuel injection equipment. *All in all, the Bosch organization seems to have a very adequate aftermarket group in the United States.* Mr. Hertz was not available for a very long time and therefore *we did not have ample opportunity to probe what opportunities for cooperation might exist in this area.* Also we were not able to cover distribution in South America [12] or Mexico as a result of his tight schedule. *These topics will be reviewed further in future meetings* (CX 29I; emphasis added).

58. The memorandum makes it clear that Bosch U.S.'s activities in the United States automotive aftermarket were subject to a Bosch GmbH official "in charge of the aftermarket outside of Europe" and that Bosch U.S.'s activities were considered to be a part of the Bosch

organization as a whole[4] (Finding 57).

59. The only company located in the United States to which Bosch GmbH sells automotive products is Bosch U.S. (CX 88 p. 33–34). In the United States, Bosch U.S. performs warranty service for Bosch automotive equipment in case of failure. It has "total product responsibility in this market, for application, training, service, warranty" (CX 88 at 33). Bosch GmbH handles after sales service matters in close cooperation with those responsible for such functions in locations outside Germany. In this connection, Bosch GmbH, which provides a world wide "Service Network" (CX 64S), represents:

> Robert Bosch GmbH is divided into various divisions. One of these, the Automotive Equipment Division, is itself further subdivided into a number of Product Divisions and an Aftermarket Division. Inside this division (KH), everything concerning aftersales service for the Automotive Equipment Division is handled by KH/VKD, the Head Department for the Bosch Service Organization, in close cooperation with the Product Divisions, the Technical Sales Divisions in inland, and our National Representatives in other countries (CX 64Y).

60. On March 10, 1976, K.C. Berger of Bosch GmbH wrote to Charles W. Shiver president of the Borg-Warner hydraulics division that he looked forward to another meeting "to formulate a joint action plan for the U.S. and overseas" (CX 37A–B). The suggestion by a Bosch GmbH official that Bosch GmbH and Borg-Warner officials meet to formulate a joint action plan concerning the marketing of or technical cooperation with respect to hydraulics in the U.S. as well as overseas compels [13] the inference that Bosch GmbH could exercise control over Bosch U.S.'s marketing decisions.

61. Bosch GmbH, although it does not control Bosch U.S.'s day-to-day marketing and operating decisions, has the power to control the major business decisions of this subsidiary, which was set up to market Bosch's products in the United States and whose activities have been coordinated in important respects with the worldwide operations of the Bosch group (Findings 33–60).

IV. AUTOMOTIVE REPLACEMENT PARTS

A. *The Automotive Parts Aftermarket*

62. Distribution in the wholesale automotive parts aftermarket takes place at three levels. Suppliers of parts such as Bosch U.S. and Borg-Warner assemble and distribute lines of automotive parts which they resell to warehouse distributors (WDs). The WDs, who are authorized by the supplier to resell one or more lines, are intermediate wholesalers. The function of the WD is to maintain local inventories

[4] The exhibit in question consists of Mr. Weltyk's notes of that meeting. He testified on Dec. 19, 1979 (Weltyk 1308).

of their product lines and to resell those lines to jobbers. In return for that service, suppliers grant WDs a functional discount from the jobber price. Jobbers serve as wholesale suppliers to retail outlets, such as repair shops or service stations. Some jobbers also make over-the-counter retail sales (Nelson 496; Weber 802–03; Bendixen 913).

63. A line of automotive parts are the parts necessary to supply and complete the function of a specific phase of operations within a vehicle, for example, ignition parts (Reichers 622).

64. A full line of auto parts is a line which has all parts in the relevant functional category necessary to repair the great majority of cars estimated to be in service in a given area (Weber 861; *see also* Wagner 1223–24).

65. A short line is a series of products within a specified category such as ignition parts which is comprised only of high turnover or fast moving items (Weber 861).

66. In many instances, a manufacturer can successfully compete against a firm offering a broader line by offering a line comprised of the fast moving items (Nelson 608–09).

67. There is no single manufacturer of or supplier of auto parts that offers every single part with application on all domestically-produced vehicles or every part with application on all foreign made vehicles (Nelson 498–99). [14]

68. Catalogs of auto parts suppliers (including those of Borg-Warner and Bosch U.S.) are distributed to WDs who in turn distribute them to their customers. Such catalogs are used to make purchasing and installation decisions (Nelson 491).

69. The coverage of the automotive parts lines of different manufacturers can be compared by examining the manufacturers' interchange lists (Weber 772, 860).

70. When a WD substitutes one line for another, this is known as a "change over" of a line. During a change over, the displaced supplier's parts are reboxed and renumbered so that they can be sold from the incoming supplier's catalog. Such change overs occur between substitutable lines (Reichers 633–34, 646; Johnson 979–82).

71. The record does not evidence change overs between the Bosch and Borg-Warner auto parts lines (Reichers 646–47, 649–50).

72. Traditional WDs are domestic distributors who sell their parts through jobbers (Wagner 1258–59). A traditional full-line WD carries a multiplicity of parts to service the major portion of all phases of vehicle operation (Reichers (625–26). Traditional full-line WDs do not attempt to provide complete service for import cars (Reichers 626).

73. The AWDA is the Automotive Warehouse Distributors Association. It is comprised of domestic WDs throughout the United States as well as automotive parts manufacturers (Wagner 1258–59; CX 85). Import specialist WDs are not members of that organization (Wagner

1259). For manufacturer members the annual AWDA meeting "is also a means to obtain new warehouse distributors" (Wagner 1259).

74. Individuals who repair or own foreign cars prefer parts made overseas (Wildermuth 1396).

75. There are distributors who specialize in parts for import cars (Reichers 628; Steiner 1368–69). Geon, Lucas, Beck/Arnley, World Parts, and Repco are such distributors (Reichers 629). Specialized WDs handling foreign car parts generally sell their products to import jobbers (Wagner 1232).

76. WDs do not necessarily stock a full line of automotive parts. If it is the fast moving items within a line which sell, those are the items which will be stocked by certain WDs (Wildermuth 1409).[5] **[15]**

77. Most WDs don't duplicate lines because it increases inventory, reduces turnover, and affects their return on investment (Reichers 705). One WD carries the Borg-Warner and Bosch lines of ignition parts and needs both in its business, considering them complementary (Wildermuth 1406–07).

78. Domestic WDs who sell Bosch products for foreign car applications sell through traditional channels by selling through independent jobbers (Wagner 1234).

79. There are jobbers specializing in selling parts for domestic car applications and jobbers who specialize in selling parts for foreign car applications (Wildermuth 1396; Wagner 1232).

80. Some foreign car jobbers carry only foreign car parts, but other jobbers in that category carry both domestic and foreign car parts (Wildermuth 1396–97). Jobbers involved in foreign car part sales have a tendency to buy from Bosch because of a preference for original equipment parts (Wildermuth 1405).

81. In the case of domestic jobbers, it is not unusual for jobbers to carry parts for domestic cars and parts for the more popular foreign imports (Weber 846–47). Some jobbers sell full lines of both domestic and imported parts (Wagner 1237). Certain WDs sell to both domestic and foreign car jobbers (Wildermuth 1396).

82. There are approximately 15 million foreign cars from 35–40 manufacturers on the road in the United States today (Wagner 1224–25). VWs constitute four million of this total (Wagner 1251). The three leading sellers of foreign cars based on registration are Toyota, Datsun, and Volkswagen (Wagner 1269).

B. *Borg-Warner*

83. The Borg-Warner Automotive Parts Division, functions as the marketing arm for other Borg-Warner divisions involved in manufac-

[5] As one WD witness stated "We don't stock a full line of anything . . . we stock what we sell" (Wildermuth 1409).

turing parts and components for original equipment manufacturers.[6]

84. In 1978, the Borg-Warner Automotive Parts Division had approximate sales of $69.1 million accounting for approximately [16] 3 percent of total Borg-Warner sales (BWX 34A, *in camera*). It sells only in the aftermarket (Reichers 621).

85. Borg-Warner sells replacement parts for domestic and imported cars, offering a short line for foreign applications (Weber 861).

86. Because of popular demand from its WDs, Borg-Warner around 1972 and 1973 began adding applications for fast-moving popular import cars (Reichers 639).

87. The Borg-Warner Automotive Parts Division sells to traditional full-line WDs (Reichers 625). It is a member of AWDA (CX 85; Finding 73). There are approximately 1,000 full-line WDs in the United States, and about 700 of these are served by the Borg-Warner auto parts division (Reichers 638). Borg-Warner does not attempt to sell to companies specializing in parts for imported cars (Reichers 629).

88. The Borg-Warner Auto Parts Division does not sell individual parts to WDs (Reichers 637). Borg-Warner will sell a single product line to a customer, as for example the ignition line (Johnson 1003). While Borg-Warner normally sells every application in a line to a customer, the customer does not necessarily have to buy every application within a line such as slow moving items (Johnson 1003). The typical Borg-Warner WD does not have more than one supplier for a given line (Reichers 634).

C. *Bosch U.S.-Bosch GmbH*

89. Bosch U.S. has an ASM Division which is engaged in automotive sales to manufacturers in the aftermarket (Bendixen 894) and the ASD division which is engaged in automotive sales to independent distributors (Bendixen 895). In addition, there is the Automotive Marketing Department of Bosch U.S. which is engaged in product management, cataloguing, advertising and sales promotion (Bendixen 896).

90. The total dollar amount of Bosch U.S. sales in 1978 to WDs was approximately $36 million (Bendixen 914). Of this total 30 percent of the sales are to common or domestic WDs and 70 percent is comprised of sales to import WDs (Bendixen 914).

91. Ignition parts, wire and cable kits and carburetor kits accounted for 15 percent of Bosch U.S.'s automotive aftermarket sales in 1978 (Bendixen 917).

92. Bosch offers a full-line of automotive parts for foreign car applications (Weber 861–62).

93. Bosch U.S.'s primary source of auto parts is Germany; it also

[6] The automotive parts division reports to the president of the transportation equipment group which is one of five Borg-Warner groups representing 13 divisions primarily involved in transportation equipment (Reichers 622).

obtains parts from Bosch's factory in Brazil, and in the [17] case of its expanding ignition line for Japanese parts these come directly from Japan (Bendixen 900).

94. The advertising of Bosch U.S. represents that its parts are original equipment on many foreign cars (RBUSX 4).

95. Bosch U.S. has published certain advertisements in publications whose circulation includes WDs who distribute parts for domestically produced cars (Bendixen 931–32). Such advertisements "are directed to the total automotive aftermarket, and there is nothing special for the import. They all read the same magazines and the magazines are read by import distributors, by warehouse distributors, common warehouse distributors, jobbers and some consumers" (Bendixen 932–33).

96. Bosch U.S. sells to two types of WDs, import specialists, and domestic or traditional WDs (Wagner 1213, 1266–67; Bendixen 914). Bosch U.S. is a member of AWDA (Wagner 1258–59; Finding 73).

97. There are approximately 540 WDs who sell Bosch products (Bendixen 912). Approximately 30 percent of these WDs are import specialists (Bendixen 913). The other 70 percent of the WDs selling Bosch products are domestic WDs selling parts for domestic and import cars (Bendixen 913–14).

98. In 1978, the total dollar amount of Bosch U.S.'s sales to WDs was about $36 million (Bendixen 914). Bosch U.S. sales to special import parts WDs accounted for 70 percent of its total dollar volume (Bendixen 914). Its sales to domestic WDs were on the order of $10 million in that year.[7]

D. *Ignition Parts*

1. The Product

99. Ignition parts are generally considered to be a separate line in the automotive parts aftermarket (Weber 778). The term ignition parts, as commonly understood in the industry, means the distributor and the service components which are the points, condensors, caps, rotors, and vacuums (Bendixen 897). Alternators, generators, and starters are considered electrical parts (Bendixen 898; CX 88 p. 32).

100. The relevant geographic market for the purpose of determining whether competition in the sale of ignition and [18] other relevant auto parts exists between Bosch U.S. and Borg-Warner and Bosch GmbH and Borg-Warner is the United States (Comp. Counsel Int. p. 4).

[7] Thirty percent of $36 million.

2. Borg-Warner

101. The Borg-Warner ignition parts line consists of contact point sets, condensors, voltage regulators, coils, caps, rotors and switches (Reichers 639; Johnson 987).

102. Borg-Warner attempts to carry as wide a coverage as possible or at least 90 percent of the aftermarket for domestic cars (Reichers 639). The Borg-Warner ignition parts line also includes parts for import car applications (Reichers 639). Borg-Warner carries a short line of ignition parts for foreign applications (Weber 861).

103. The Borg-Warner ignition line includes import car applications "because of popular demand" (Reichers 640).

104. In 1978, the approximate sales of Borg-Warner's ignition line by the Automotive Parts Division were $12.1 million. Of that total less than 5 percent ($600,000) were sales for import car applications (BWX 34A *in camera;* Reichers 640–41).

105. WDs advertise that they offer Borg-Warner ignition parts for application on domestic and import cars (CX 96H).

106. Borg-Warner considered Standard Motor Products, Niehoff, Guaranteed, and Filko to be its competitors in the ignition parts line among the major independent manufacturers (Reichers 645). Its other major competitors were original equipment manufacturers such as General Motors, selling under its own brand name, Ford which sells under Motorcraft name, and Chrysler which sells under the Mopar brand name (Reichers 646).

3. Bosch GmbH-Bosch U.S.

107. Ignition parts manufactured by Bosch GmbH are sold in the Federal Republic of Germany to Bosch U.S. (Bosch GmbH Int. No. 21). Bosch GmbH supplies 90 percent of Bosch U.S.'s requirements for the automotive ignition parts aftermarket (CX 88 p. 29). Sales of ignition parts[8] to Bosch U.S. have [19] been as follows (in thousands of U.S. dollars*):

	1976	1977	1978
1. Points (contact sets)	2199	2064	2281
2. Condensers	1662	1281	1328
3. Caps	1050	799	1079
4. Rotors	780	528	626
5. Ignition Coils and Resistors	744	530	781

[8] The definition of the ignition line was broader for the purposes of the interrogatories than that given by the testimony of the industry witnesses (*Compare* Finding 99).

	1976	1977	1978
6. Ignition Kits	397	285	269
7. Cap and Rotor Kits	164	152	233
8. Switches	1102	1310	1114
9. Alternators (and parts thereof)	1870	1923	2286
10. Generators (and parts thereof)	3060	2203	2914
11. Starters (and parts thereof)	4173	4015	3405
12. Regulators	2046	2476	1678
13. Vacuum Controls	-	-	-
14. Distributor Bushings	-	-	-
15. Distributor Leads	346	541	662
16. Horns	209	120	436

* All figures are approximate, owing to exchange rate fluctuations (Bosch GmbH Int. No. 21 at 27–28).

108. Bosch U.S., in addition to carrying Bosch GmbH ignition parts, which is the primary source of supply, also purchased such products from Japanese and domestic sources (Fiene 1332; Bendixen 900).

109. Bosch U.S.'s fast moving items constitute the majority of its sales of ignition parts in the United States (Wagner 1275).

110. Bosch U.S. made the following sales in 1978 of the products indicated:

(a)	points (contact sets)	(a)	$3,144,349.
(b)	condensers	(b)	1,465,802.
(c)	caps	(c)	998,896.
(d)	rotors	(d)	708,404.
(e)	ignition coils and resistors	(e)	978,335.
(f)	ignition kits	(f)	711,015.
(g)	cap and rotor kits	(g)	299,564.
(h)	switches, relays and solenoids	(h)	1,872,460.
(i)	alternators (and parts thereof)	(i)	4,053,702.
(j)	generators (and parts thereof)	(j)	4,384,031.
(k)	starters (and parts thereof)	(k)	9,310,463. **[20]**
(l)	regulators	(l)	2,200,671.
(m)	vacuum controls	(m)	150,670.
(n)	distributor bushings	(n)	-0-
(o)	distributor leads	(o)	-0-
(p)	horns	(p)	48,590.

(Bosch U.S. Int. No. 33)

111. Certain of the fast moving items in the Borg-Warner and Bosch ignition lines are interchangeable for example:

Contact Set (Points)

Borg-Warner part number A 515 is interchangeable with Bosch part number 1–237–013–026 (CX 4Z–191; 17Z–121).

Condensers

Borg-Warner part number G 582 is interchangeable with Bosch part number 1–237–330–067 (CX 4Z–210, 17Z–38 through Z–43).

Distributor Caps

Borg-Warner part number C 541 is interchangeable with Bosch part number 1–235–522–027 (CX 4Z–196, 17Z–113 through Z–114).

Rotors

Borg-Warner part number D 555 is interchangeable with Bosch part number 1–234–332–074 (CX 4Z–202, 17Z–89 through Z–91).

112. The four most popular ignition parts are points, condensers, distributor caps and rotors (Bendixen 920). In its 1977 and prior year catalogs, Borg-Warner offered extensive coverage of the four most popular ignition parts having application on Volkswagens, Toyotas and Datsuns (CX 3A through Z–36, 4A through Z–248, 5A through Z–6). As shown by the following table, Borg-Warner's coverage for such vehicles in general was comparable to that of Bosch U.S. and three firms that Bosch U.S. considers among its chief competitors, Filko, Wells and A.C. Delco (Bendixen 922). [21]

MODELS THRU 1976

Company	Points (contact sets) Part Numbers Offered			Condensers Part Numbers Offered			Distributor Caps Part Numbers Offered			Rotors Part Numbers Offered			Exhibit No.
	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	Datsun	Toyota	Volkswagen	
Borg-Warner Corp.	2	2	7	4	3	9	5	3	6	2	4	6	CX 3S, Z-32, Z-34; CX 4U, Z-32, Z-34; CX 5J, W
Robert Bosch Corp.	3	5	4	4	4	11	5	5	5	2	4	8	CX 17Z-11-Z-17, Z-96-Z-103, Z-104-Z-123
General Motors A.C. Delco (Delco-Remy)	2	3	3	2	3	4	2	4	2	1	2	2	CX 98 at 234, 241, 243-44
Filko	3	5	8	5	3	10	5	4	5	3	4	9	CX 99 at 74-75 88-90
Wells Mfg. Corp.	2	3	8	3	3	15	4	5	5	2	3	8	CX 100 at 123, 143, 146-47 [22]

E. *Carburetor Tune-Up Kits*

1. The Product

113. Carburetor tune-up kits are kits that contain the necessary parts to tune up a particular carburetor (Reichers 644; Wildermuth 1396). They are generally considered to be a separate line of parts in the automotive parts aftermarket (Weber 778). Carburetor kits are used in the repair of both domestically produced and foreign made vehicles (CX 16A–Z–43).

114. Carburetor kits vary depending on the characteristics of the particular carburetor (Wagner 1246–47). Kits made for a specific application must be used for that purpose (Wagner 1246).

2. Borg-Warner

115. Borg-Warner manufactures carburetor kits (Reichers 624). The coverage of the Borg-Warner auto parts division carburetor kit line is the broadest in the industry (Reichers 644). It covered the major portion of domestic car applications, light trucks, other gasoline engines, stationary equipment, tractor and farm equipment and some import cars (Reichers 645).

116. In 1978, the Borg-Warner Automotive Parts Division sales of carburetor kits to WDs amounted to approximately $4.1 million. Of that percentage, no more than 5 percent or $205,000 were for import car applications (Reichers 645;[9] BWX 34A *in camera*).

117. Borg-Warner distributed and sold carburetor kits under its own brand to WDs (CX 2B, *in camera;* BWX 25A). It also sold carburetor kits under private label to other auto parts suppliers, including Bosch U.S. and Lucas, a competitor of Bosch U.S. (Wagner 1245–46).

118. Borg-Warner advertises that its line of carburetor kits is "super consolidated" and that "most kits cover several applications. So they're easy to stock" (CX 70C). [23]

119. Borg-Warner advertises Volkswagen carburetor kits as one of its fastest moving items (BWX 25A; Wagner 1248), representing in pertinent part as follows:

> Get big savings on the big movers [including kit No. 10272C SL1-Volkswagon] . . .
>
> The 18 kits in the table are the fastest movers. In fact, they account for almost 50% of carb kit sales. . . . (BWX 25A).

120. Borg-Warner advertises that it is the largest supplier of carburetor kits including domestic and foreign applications (Reichers 743; CX 70A-C). Its advertisement in the June 1979 issue of Motor Magazine states in pertinent part:

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[9] This figure does not include Borg-Warner sales of carburetor kits to non WDs.

Coverage [of carburetor kits] is current—and the broadest in the market: domestic cars, trucks, and imports. . . . (CX 70A-C).

121. WDs advertise that they carry Borg-Warner carburetor kits with application on both domestic and imported vehicles (CX 96H).

3. Bosch U.S.-Bosch GmbH

122. Bosch U.S. sells carburetor kits which it purchases from Borg-Warner made especially for Bosch U.S. under a private label pursuant to Bosch U.S.'s specifications (Finding 117; Wagner 1245). It markets a full-line of carburetor kits for foreign made vehicles (Weber 867).

123. Bosch U.S.'s 1978 sales of carburetor kits amounted to $151,197 (Bosch U.S. Int. No. 33 q at 31).

124. The coverage of Robert Bosch's carburetor kits with application on foreign made cars compared with Borg-Warner's coverage of carburetor kits for foreign made cars is "comparable or close to being the same, since Borg-Warner manufactures them for us [Bosch U.S.]" (Wagner 1273; Bendixen 930).

F. *Wire And Cable*

1. The Product

125. Wire and cable is a distinct line of automotive replacement parts including the following products: [24]

(1) Battery cable
(2) Ignition wire/cable sets (referred to herein as "ignition sets")
(3) Terminals and connectors
(4) Bulk wire
(5) Pigtails and sockets
(6) Spark plug connectors

(CX 15A through Z–80, 17A through Z–135; Nelson 607)

126. An ignition cable set or "ignition set" consists of a group of cables of various lengths with appropriate connectors which link the distributor to the spark plugs (CX 72B-C; Nelson 507, 512, 514).

127. There are several varieties of ignition sets including "universal" ignition sets and "custom" ignition sets (CX 15Z–30 through Z–43; Nelson 504).

128. A "Universal" ignition set is one which can be adapted to a wide number of applications by cutting the wire to fit (Reichers 642; Nelson 506). A universal set is not uniquely tailored to a particular application (Nelson 506, 595). Custom sets are tailored more closely to particular applications (Nelson 595–96).

129. Universal sets may be used for both foreign and domestic car applications (Finding 136).

130. Certain custom ignition sets have application on both domestically and foreign made vehicles (CX 15Z–34 through Z–35).

131. Ignition sets are made from two types of material, copper wire and resistance core wire (Nelson 610). Domestically produced vehicles generally use resistance core wire as original equipment while foreign made vehicles generally use copper wire as original equipment (Nelson 600–01).

132. A WD may carry more than one line of wire and cable (Weber 834–35;[10] Flicker 1193). [25]

2. Borg-Warner

133. Borg-Warner has a wire and cable line that covers the majority of domestic car applications and some import car applications (Reichers 641).

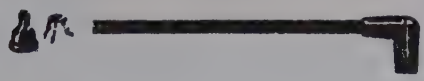
134. In 1978, the sales of the Borg-Warner Automotive Parts Division wire and cable lines were approximately $2.9 million. Of those sales about 2 to 3 percent or $58,000 to $87,000 were for import car applications (BWX 34A, *in camera;* Reichers 643–44).

135. Borg-Warner's wire and cable is a glass core-wire (not copper); it has a higher resistance to TV-radio interference and is a more intricately engineered product than copper wire (Reichers 641). Other types of wire and cable can be used for the same application as resistance core sets (Johnson 1014–15). [26]

136. The Borg-Warner Universal Ignition sets, RH 11 and RH 13, are examples of universal sets which have application to a wide variety of domestic and foreign cars as demonstrated by the following entries in the Borg-Warner catalogue:

[10] For example, P.E. Weber has as its primary wire and cable line products manufactured by AAA Specialty Company and keeps a minimum inventory of Borg-Warner wire and cable (Weber 834–35).

4 CYLINDER UNIVERSAL SETS



RH11

Straight Dist. Nipple
Right Spark Plug Boot

American Motors	1978-77
Audi	1977-70
Bobcat	1976-75
Chevrolet Truck	1965-63
Foreign Cars	1977-52
Jeep	1971-65
Mustang II	1976-74
Nova	1970-62
Pinto	1976-71
Scout	1972-61
Vega	1974-71

6 CYLINDER UNIVERSAL SETS

RH13

Straight Dist. Nipple
Straight Spark Plug Boot

American Motors	1978-58
Bronco	1974-66
Buick Prod.	1974-73; 71-62
Checker	1974-61
Chevrolet & Truck	1974-46
Dodge & Truck	1978-58
Ford Prod.	1976-54
Foreign Cars	1977-56
GMC Truck	1974-50
IHC Truck	1974-70; 64-61
Jeep	1976; 74-66; 64; 62-56
Nash	1956-50
Oldsmobile	1974-64
Plymouth	1978-60
Pontiac	1974-64
Studebaker	1966-65

(CX 15Z–30)

137. Some of Borg-Warner's Custom Ignition sets apply to both domestic and import cars. One custom ignition set CH 410 is made for Volkswagen model years 1977–53 alone (CX 15Z–34). In this connection, the Borg-Warner Wire and Cable catalogue dated April 1978 represents as follows: [27]

CUSTOM IGNITION SETS

THE PROVEN LINE THAT SERVES ALL YOUR TUNE-UP NEEDS

KOOLWIRE

4 CYLINDER

CH410
Straight Dist. Nipple
Special Spark Plug Boot
Volkswagen 1977-53

CH412
Right Dist. Nipple
Special Spark Plug Boot
Vega 1974-71

CH413
Straight Dist. Nipple
Straight Silicone Spark Plug Boot
American Motors 1978-77
BMW 1977
Pinto 1974-71
Saab 1974-71

CH414
Straight Dist. Nipple
Straight Spark Plug Boot
Datsun 1973-65
Honda 1977-73
IHC Scout 1977-75; 72-61
Mazda 1977-71
Saab 1977-75

CH415
Straight Dist. Nipple
Straight Silicone Spark Plug Boot
IHC Scout 1978
Mustang II 1974
Pinto 1974
Saab 1977

CH416†
Right Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Bobcat 1976-75
Capri 1976-75
Courier 1978-77
Mustang II 1976-75
Pinto 1976-75

CH417†
Special Dist. Nipple
Special Spark Plug Boot
Astre 1976-75
Monza 1977-75
Starfire 1977
Vega 1977-75

†Silicone wire

CH418
Straight Dist. Nipple
Straight Spark Plug Boot
Arrow 1977-76
Audi 1977-74
BMW 1974-66
Colt 1975-71
Fiat 1973-69
Honda 1975
Mazda 1976

CH419
Straight Dist. Nipple
Right Spark Plug Boot
Cricket 1973-71
Datsun 1977-74
Fiat 1977-74
MG 1977-69
Renault 1977-76; 73-72
Triumph 1977-74

CH420
Straight Dist. Nipple
Straight Spark Plug Boot
Fiat 1975-67
Ford (English) 1970-64
Mazda 1977-70
Opel 1973-69
Saab 1973-70
Subaru 1977-73
Toyota 1977-75
Triumph 1977-75

CH421
Straight Dist. Nipple
Straight Spark Plug Boot
Audi 1977-75
Austin 1975-69
Courier 1975-72
Datsun 1973-64
Fiat 1977-76
Mazda 1977
Opel 1975-74
Renault 1973
Toyota 1974-68
Triumph 1973-69
Volkswagen 1977-74
Volvo 1975-68

CH422†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Bobcat 1978-77
Capri 1977
Fairmont 1978
Fiesta 1978
Mustang II 1978-77
Pinto 1978-77
Zephyr 1978

CH423†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Astre ..... [illegible]
Monza 1978
Starfire ..... [illegible]
Sunbird ..... [illegible]
Ventura II & Phoenix ..... [illegible]

CH424†
Special Dist. Nipple
Elongated Straight Silicone
Spark Plug Boot
Chevette 1978-76

6 CYLINDER

CH610
Straight Dist. Nipple
Special Spark Plug Boot
Corvair ..... [illegible]

CH612
Straight Dist. Nipple
4 Right Spark Plug Boots
2 Straight Spark Plug Boots
Ford Prod. 1964-63

CH614
Straight Dist. Nipple
Straight Spark Plug Boot
G.M.C. Truck ..... [illegible]

CH615
Straight Dist. Nipple
Straight Spark Plug Boot
Ford Prod. ..... [illegible]
G.M. Prod. ..... [illegible]
Studebaker ..... [illegible]
Volvo ..... [illegible]

CH616
Straight Dist. Nipple
Straight Spark Plug Boot
American Motors ..... 1976-[illegible]
Chevrolet Prod. ..... [illegible]
Chrysler Prod. ..... [illegible]
Corvette ..... [illegible]
Ford Prod. ..... [illegible]
G.M.C. Truck ..... [illegible]
International Truck ..... [illegible]
Jeep ..... [illegible]
Toyota ..... [illegible]
Triumph ..... [illegible]

[28] 138. Borg-Warner offers custom ignition sets incorporating resistance core wire for application on foreign made vehicles (CX 15Z–34 through Z–35, Z–39 through Z–41; Nelson 610).

3. Bosch U.S.-Bosch GmbH

139. Bosch U.S. sells spark plug connectors and ignition wire. It does not sell battery cables, terminals or connectors, bulk wire or pigtail and sockets (Bendixen 899). Bosch U.S.'s wire and cable sales are limited to import car applications (Bendixen 898). Ignition cable sets is the only wire and cable product Bosch U.S. has (Bendixen 899).

140. Bosch GmbH is not in the wire and cable business and Bosch U.S. buys domestic wire and cable so that it will have a full line of parts (Fiene 1338; CX 88 p. 34). It buys bulk cable and will cut and fit it as required for hook-up leads (CX 88 p. 34).

141. Bosch U.S. sells a full line of ignition cable sets for import applications (Weber 867). They are the same as original equipment. Import cars are equipped with wire sets whose main ingredient is copper (Wagner 1244). U.S. domestic cars, on the other hand, require radio suppressant wire and copper is not an ingredient of that product (Wagner 1244).[11]

142. The Bosch U.S. ignition sets are offered exclusively for foreign applications (CX 17; Wagner 1262, 1264–66).

143. In the case of wire and cable, *i.e.,* ignition sets, Borg-Warner has an application for almost all the fast moving foreign car applications covered by Bosch U.S. (Nelson 513–14; CX 15, 17Z–135 *et seq.*).

144. The record gives no specific figure for sales by Bosch U.S. of ignition or cable sets. The sales volume for 1978 given for wire and cable products in respondent's interrogatory response was $858,027 (Bosch U.S. Int. No. 33 r at 30–31).

G. *Competition Between Borg-Warner And Bosch U.S. In Automotive Parts*

145. Borg-Warner and Bosch U.S. both sell to domestic WDs who also sell automotive parts for import car applications (Findings 78, 86–87, 96). In fact, both Borg-Warner and Bosch [29] U.S. are manufacturer members of the same trade association of "traditional" WDs (Findings 73, 87, 96). Borg-Warner does not sell to WDs specializing in import parts (Finding 87).

146. Seventy percent of Bosch U.S.'s WD customers are domestic WDs in the same category as Borg-Warner's customers (Findings 96–97). They account for 30 percent of Bosch U.S.'s business with WDs (Findings 90, 98).

147. Borg-Warner's Auto Parts catalogues have entries expressly

[11] Imported cars use a suppressor connector to perform that function (Wagner 1244).

devoted to import car applications in the relevant product lines (CX 3; Findings 112, 136, 137).

148. Borg-Warner advertises in the trade press that it sells auto parts for domestic and import applications (Findings 119–20). WDs advertise that they carry Borg-Warner carburetor kits with application on foreign and imported vehicles (Finding 121).

149. Borg-Warner commenced selling import car parts to domestic WDs because of "popular demand" from such distributors (Finding 86).

150. Borg-Warner offers a short line of auto parts generally for fast moving import parts (ignition parts and wire and cable sets). In the case of carburetor kits the Borg-Warner/Bosch U.S. offerings are comparable (Findings 102, 124, 133).

151. Bosch U.S. offers essentially a "full" line of automotive parts in the relevant products for import car applications (Findings 92, 141).

152. Certain of Bosch U.S.'s advertisement for import car parts appear in trade magazines whose circulation includes domestic WDs (Finding 95).

153. Bosch U.S.'s "full" line of import parts cannot be substituted for Borg-Warner's entire line of automotive parts which includes a full line of parts for domestic applications in addition to a short line of fast moving parts for import applications (Findings 85, 92, 102).

154. WDs do not always buy a "full" line of parts; they may also purchase a "short" line fast moving parts depending on demand in their area (Findings 76, 88). Domestic WDs have the choice of buying a fast moving line of auto parts in the [30] relevant products for application to popular import cars from either Bosch U.S. or Borg-Warner, or from both.[12]

155. A WD who does dual line has the choice of allocating his purchases among two suppliers where their lines overlap. He may, for example, carry a minimum inventory in one line (Finding 132 n. 10).

156. A supplier with a "short" line of fast moving parts can compete against a full line of automotive replacement parts (Finding 66).

157. Since Bosch U.S. offers a "full" line of auto parts for import car applications (Finding 92) it of necessity covers the fast moving parts for popular import car applications. The Bosch U.S. and Borg-Warner lines of automotive products overlap in fast moving import car parts for the relevant products in sales to domestic WDs (Findings 85, 102, 111–12, 124, 136–37). Bosch U.S. and Borg-Warner compete in the sale of fast moving ignition parts, carburetor kits, and wire and cable to domestic distributors for popular import cars.

158. Bosch GmbH competes with Borg-Warner in the marketing of

[12] While many WDs do not dual line because of inventory problems this is a choice which is open to them (Wildermuth 1406–07; Findings 77, 132).

the relevant automotive replacement parts for application to popular import cars to domestic WDs by virtue of the operations of Bosch U.S. (Findings 33–61).

V. HYDRAULIC PRODUCTS

A. *The Hydraulic Products Market*

159. Hydraulic products actuate mechanical devices using fluids under pressure (CX 77E).[13]

160. Hydraulic pumps convert "mechanical horsepower from a source, such as a diesel engine, into fluid horsepower to provide the work force necessary for hydraulic cylinder or hydraulic motor activation" (CX 77H).

161. Hydraulic valves control "the work to be done by a cylinder or a motor" (CX 77H). [31]

162. Gear motors or hydraulic motors are "used to convert energy in a fluid to continuous mechanical rotary motion and torque. In design and construction, hydraulic gear motors are virtually identical to pumps" (CX 77I).

163. Products in the hydraulic industry consist primarily of pumps, valves, motors, cylinders, hoses, and fittings which are marketed through distributors and direct to original equipment manufacturers (OEMs) (CX 77L).

164. There are two types of hydraulic directional control valves: Monobloc valves which contain all the required control circuits in one body and stack valves, comprised of individual sections which can be stacked to provide the required number of control circuits (CX 81A, *in camera*).

164. The U.S. hydraulics market is divided into three different areas: areospace, industrial, and mobile (Trauscht 1084). The mobile equipment area includes all types of agricultural tractors and related equipment, rider-type lift trucks, light and medium construction equipment, over the road trucks, and miscellaneous equipment such as winches, booms and auxiliary power units (CX 76E, *in camera).* Industrial hydraulic applications include hydraulic package units, lifts, machine tools, mining machinery, presses, etc. (CX 77L).

166. In the United States competition among hydraulic products suppliers is mainly in parts, not so much in systems. Systems are, for the most part, designed by manufacturers, dealers, hydraulics distributors, or machine tool builders. They will buy components and put together a system (Weisse 1518).

167. The European market for hydraulic products in 1974 was high

[13] "General fluid power systems are those that transmit and control power through use of a pressurized fluid (liquid or gas) within an enclosed circuit" (CX 77H).

pressure designed. The U.S. market then and now is low pressure designed (Weisse 1484–85; Weltyk 1285; Trauscht 1109).

168. European dimensions for hydraulic products are metric while the U.S. dimensions are in feet and inches (Trauscht 1109).

169. In the mobile sector, hydraulics manufacturers deal with original equipment manufacturers (OEMs) who tend to set systems specifications including mounting location and the location for ports on valves (Weltyk 1287). In such a case, the hydraulics manufacturer custom designs a valve for their applications (Weltyk 1287).

170. Selling hydraulic products to OEMs of mobile equipment involves the following process. Manufacturers of products such as trucks, earth moving machinery, cranes, etc. design the entire piece of equipment. Such OEMS tend to set the system specifications. For example, the OEMs determine the mounting location, and where they want the ports on the valves. The manufacturer of hydraulic products in essence designs a valve [32] for the OEM and attempts to convince the OEM with tests and development work that the valve will meet the specifications set. The OEM then tests the valve to determine whether the specifications have been met. Subsequently, the product is tested for durability (Weltyk 1287).

171. Some distributors design their own hydraulic systems and use hydraulic components in these systems or they may sell components to end users such as machine tool manufacturers (Weisse 1499).

B. *Borg-Warner*

172. Borg-Warner designed, manufactured, marketed and serviced hydraulic gear pumps, motors and pressure compensated stack type directional control valves and special control valves for hydraulic systems (CX 77H). Its hydraulic product line consisted primarily of gear pumps and stack valves (Weltyk 1283). It also supplied custom-designed hydraulic control systems (CX 77J).

173. The principal thrust of Borg-Warner's gear pump business was an attempt by the engineering department to convince a customer that they could come up with a good technical answer to his problem and to price the product properly (Trauscht 1087). Borg-Warner's valve business, on the other hand, involved principally contract manufacturing. In this area, Borg-Warner was not selling strong technology but rather manufacturing to the prints of the customer (Trauscht 1087).

174. Borg-Warner's hydraulic product line was limited primarily to gear pumps and stack valves (Weltyk 1283); its production was confined to gear pumps, motors, and valves (Trauscht 1086), and it sold no accumulators or piston pumps.

175. In 1978, the approximate annual sales of Borg-Warner's hy-

draulics division were approximately $18 million. Of that amount $15 million represented domestic sales and $3 million represented overseas sales (Trauscht 1071).

176. The top 10 customers of the Borg-Warner hydraulics division were OEMs of mobile equipment such as John Deere and International Harvester. Sales to them constituted 80 percent of total sales (Trauscht 1087–88; Weltyk 1287–88).

177. Borg-Warner's hydraulics division made no effort to serve the industrial segment of the hydraulics market through distributors. Rather, the sales of Borg-Warner hydraulic products to distributors were for replacement parts for original mobile equipment (Trauscht 1154–55; *see also* BWX 29D).

178. Borg-Warner tried to sell systems to OEMs in the United States but not overseas (Weltyk 1288). Borg-Warner was [33] not in the overseas market except to supply U.S. design hydraulic products to production facilities of U.S. companies overseas (Trauscht 1088–89, 1131 *in camera).*

179. In July 1979, Borg-Warner sold its Hydraulics Division to Rexroth, a subsidary of Mannesmann A.G. (Borg-Warner Int. No. 1 at 3–4).

C. *Bosch GmbH-Bosch U.S.*

180. The Bosch GmbH hydraulics product line is comprehensive; in addition to gear pumps it carries radial piston pumps, positive displacement pumps, and a complete line of directional flow valves (Weltyk 1283–84).

181. Bosch GmbH supplies hydraulic valves, gear pumps, and motors to Bosch U.S. (CX 88 p. 34–35; Bosch GmbH Int. No. 27). Approximate sales by Bosch GmbH to Bosch U.S. of hydraulic valves were as follows:

1976:	$ 36,000
1977:	$ 57,000
1978:	$533,000

(Bosch GmbH Int. No. 27)

Sales of hydraulic gear pumps and motors by Bosch GmbH to Bosch U.S. were as follows:

1976:	$ 19,000
1977:	$ 62,000
1978:	$325,000

(Bosch GmbH Int. No. 28)

182. Bosch U.S. started in the hydraulics business around 1974

(Weisse 1484). The approximate sales volume of hydraulic products by Bosch U.S. was the following:

1975:	$ 200,000
1976:	400,000
1977:	700,000
1978:	1,720,000

(Weisse 1487–88) [34]

183. In 1978, Bosch U.S.'s sales volume for hydraulic valves was $624,242 while its sales volume for hydraulic gear pumps and motors was $29,000 (Bosch U.S. Int. No. 33 s–t at 30–31).

184. In evaluating the hydraulics market, it was decided that Bosch U.S. would sell products made in Europe in the United States, namely products designed for metric systems (Weisse 1485). At that time, the European market was already using high efficient systems such as high pressure/low volume and it was anticipated that the U.S. market would go in that direction. Furthermore, the typical U.S. hydraulic systems did not use accumulators and this is one of the target areas in which Bosch U.S. wanted to go (Weisse 1485).

185. The first products which Bosch U.S. sold in the American market, beginning in 1974, were accumulators and radial piston pumps (Weisse 1487). These products were imported from Germany (Weisse 1486). The Bosch U.S. hydraulic products line now encompasses accumulators, radial piston pumps, directional control valves, electronic hitch control systems, gear pumps and certain other valves (Weisse 1487).

186. In 1976–77, Bosch U.S. started an assembly operation of accumulators in the United States (Weisse 1486).

187. Up to that point all accumulators were imported from Germany (Weisse 1486–87). Subsequently, Bosch U.S. started manufacturing of accumulators in the U.S. (Weisse 1487). Sales of accumulators comprise 40 percent of its dollar turnover in hydraulic products (CX 88 p. 35; Fiene 1337). Some of the high pressure parts are, however, still secured from Germany (Weisse 1487).

188. The hydraulics business of Bosch U.S. is basically industrial (Weisse 1502).

189. Bosch U.S. distributed its hydraulic products through dealers and OEMs. Forty percent of Bosch U.S.'s hydraulic sales were to OEMs and the balance to distributors purchasing primarily accumulators, radial piston pumps, some industrial valves, and a limited number of industrial gear pumps (Weisse 1487, 1498).

190. Bosch U.S. began selling to OEMs in the period 1977–78 (Weisse 1514). Original equipment manufacturers in the U.S. who were customers of Bosch U.S. were Clark Equipment, Massey-Ferguson, Husky Injection Molding System and Mobay Chemical Corp.

Bosch U.S. sells only accumulators to Husky, and sells radial piston pumps to Mobay. In 1978, Bosch U.S. began delivering electronic hitch controls and directional valves to Massey-Ferguson designed by Bosch U.S. in accordance with Massey-Ferguson specifications. Bosch U.S. started selling tandem gear [35] pumps to Clark Equipment the following year (Weisse 1495–97, 1522).[14]

191. Bosch GmbH collaborates with Bosch U.S. in hydraulics sales to the Massey-Ferguson Company with respect to engineering and specification requirements as well as applications. This is tied into the Bosch worldwide relationship with Massey-Ferguson trying to achieve uniform application and interchangeability, as, for example, in Europe and Brazil (CX 88 p. 35–36).

192. International Harvester, a U.S. OEM, also produces tractors in Germany which are equipped with Bosch "hydraulic components".[15] Such tractors are imported into the United States. Replacement parts for such components would be sold through the Harvester organization. Other domestic OEMs follow similar procedures (Weisse 1521).

193. The gear pumps and valves sold by Bosch U.S. to distributors are generally used by the distributor in industrial systems which the distributor itself designs, or are resold by the distributor to end users such as machine tool manufacturers (Weisse 1499).

194. Bosch U.S. sells accumulators, radial piston pumps and a low quantity of industrial gear pumps to Fauver Company, a distributor (Weisse 1498).

D. *Bosch And Borg-Warner Product Comparison*

195. The gear pump sold by Bosch U.S. is a high efficient pump with high pressure and low volume. Borg-Warner sells low pressure/high volume pumps (Weisse 1502–03). The pump sold by Bosch has a higher efficiency than the generally used systems in the United States. This is a selling point in dealing with OEMs (Weisse 1511–12). [36]

196. The Bosch and Borg-Warner hydraulics lines had gear pumps which were functionally similar (Weltyk 1284),[16] but they were not interchangeable (Weltyk 1285). The Bosch pumps working at a higher pressure are more expensive than the Borg-Warner product (Weltyk 1285).

197. High pressure cannot be used in a low pressure system because it will burst the system (Trauscht 1112). Use of low pressure components in a high pressure system would be inefficient (Weltyk 1285–86).

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[14] Borg-Warner did not have an electronic hitch control system and its directional control valves were not suitable for Massey-Ferguson. Borg-Warner did not sell a tandem gear pump (Weisse 1497). Nor did it sell accumulators or piston pumps (Finding 174).

[15] The record is unclear as to precisely what hydraulic components were involved. It is conceivable that Bosch high pressure gear pumps (*See* Tr. 1521 line 11) and valves were involved, but the testimony does not go into detail on this point.

[16] Pumps which produce a pressure and flow of a given magnitude are similar (Weltyk 1284–85).

198. The primary offering of the Borg-Warner hydraulics division was a stack valve and Bosch offered a similar valve. The valves of Bosch and Borg-Warner, like their gear pumps, however, differed physically in that they are designed to work at different pressures, have different mounting locations, and metric versus U.S. threads and fittings (Weltyk 1286).

199. The pump porting, the location of the ports, the kind of threads and fittings in the ports, the mounting bosses and their location, and the outlines of the gear pumps were different in the Bosch GmbH and Borg-Warner lines (Weltyk 1285).

200. Hydraulic line fittings on the gear pumps of Bosch and Borg-Warner did not match so they were not interchangeable (Weisse 1509).

201. Although the components such as gear pumps of low pressure and high pressure hydraulic systems are not interchangeable, a high pressure system can perform the same function as a low pressure system (Weisse 1505–06, 1511). For example:

> If you have a big bulldozer, and you want to move a certain number of dirt, . . . and use hydraulic power for that, you can use a high-pressure system.
>
> That means the whole system, that means pumps, pistons, valves, oilflow valves—controls, valves, but you have to design the system for that high pressure.
>
> And that certain hydraulic liquid flow. If you use the low-pressure system, you want [37] to do the same job, you need, because the pressure's lower, a higher flow rate, and you need for that purpose all of the components matched to that lower flow rate.
>
> That means you will have, instead of, I would say, a four-inch piston on the backup, on the high-pressure system, a five-, no, a six-inch piston on the low-pressure system.
>
> That is about the relationship . . . (Weisse 1506).

202. Bosch's line of hydraulic valves exceeded that of Borg-Warner (Weltyk 1286–87).

203. Bosch U.S. catalog specifications, with some possible exceptions, are metric (Weisse 1517). Bosch U.S., however, will sell hydraulic equipment in inches or SAE thread to an OEM customer or to a high volume customer (Weisse 1514; *see also* Trauscht 1172). All Bosch products can be easily manufactured to SAE dimensions, and Bosch as of 1976 was manufacturing certain of its products to SAE dimensions (CX 36C).

E. *Evidence On Competition Pertaining*[17] *To Borg-Warner And Bosch-Bosch U.S.*

204. The Borg-Warner hydraulics division only participated in the

[17] Respondents' documents pertinent to this issue are discussed below at pages 51–52.

mobile portion of the hydraulics market (Trauscht 1086; BWX 29D).

205. Bosch U.S. sells hydraulic products primarily to the industrial part of the market (Finding 188). Bosch U.S. sold gear pumps and valves to distributors generally for use in industrial systems, designed by the distributors or resold by distributors to end users such as machine tool manufacturers (Findings 189, 193). It also made sales to mobile equipment OEMs (Findings 189–91).

206. Massey-Ferguson is an important customer of Borg-Warner (BWX 29K) to whom Bosch U.S. also sells. However, the products which Bosch U.S. sold to Massey-Ferguson, according to this record, were not marketed by Borg-Warner (Finding 190 and n. 14). **[38]**

207. There is one hydraulics distributor, Fauver Company, which both Bosch U.S. and Borg-Warner supply (Weisse 1506–07). Bosch U.S. sales to distributors involved parts generally for industrial use (Finding 193). Borg-Warner sold hydraulic parts to distributors as mobile equipment replacement parts (Finding 177). Accordingly, no finding can be made without more evidence that Bosch U.S. and Borg-Warner competed in the case of this customer.

208. Bosch U.S. and Borg-Warner hydraulic valves and gear pumps, although performing the same function, were not interchangeable because of significant physical and performance characteristics (Findings 195–200).

209. Hydraulic systems can be designed, so as to overcome product differences, so as to utilize either high pressure (Bosch) or low pressure (Borg-Warner) parts in order to perform the same function (Finding 201). There is no evidence in the record giving concrete instances as to how this worked out in practice as far as Borg-Warner or Bosch U.S. were concerned. There is accordingly no way of determining with confidence from this record whether Bosch U.S. and Borg-Warner competed in the bidding or design stage of marketing hydraulic products in the mobile part of the U.S. hydraulics market.[18]

210. No finding can be made that Borg-Warner and Bosch U.S. compete in the sale of hydraulic products to the hydraulic products market in the United States (Findings 201, 209).

211. European and Japanese suppliers of hydraulic products had not been successful in their attempts to sell in the United States; in general their product offerings were not compatible with the United States market (Weltyk 1288–89).

212. Borg-Warner, whose hydraulic product designs were more suitable for low pressure applications and systems had made no serious attempts to sell overseas (Weltyk 1290). Essentially, Borg-Warner's

[18] The same considerations apply to evidence that Bosch GmbH made sales in Europe to U.S. mobile equipment OEMs (Finding 192).

overseas sales were confined to sales of U.S. design hydraulic products to production facilities of U.S. companies overseas (Finding 178).

213. The record will not sustain a finding that Borg-Warner and Bosch GmbH competed overseas in the sale of hydraulic products (Findings 178, 192, 209 and n. 18). **[39]**

IV. AUTOMOTIVE AIR CONDITIONING COMPRESSORS

A. *Femsa, Inc.*

214. Femsa, Inc. is a Texas corporation, incorporated in 1976, whose principal place of business is 5324 Highway 75 North, Sherman, Texas (RBGX 1D, G-H).

215. The parent company of Femsa, Inc. is Fabrica Espanola Magnetos (Femsa-Madrid) (RBGX 1H). Femsa-Madrid is owned 34 percent by Bosch Internationale[19] and 17 percent by Bosch GmbH (Bosch GmbH Verified Supplemental Answer to Int. No. 29 p. 17 dated Oct. 10, 1979).

216. Femsa, Inc. is a wholly-owned subsidiary of two entities, Femsa-Luxenbourg (FEMLUX) and Femsa-Madrid. Seven thousand five hundred of Femsa, Inc.'s shares are owned by Femsa-Madrid and 5,000 by FEMLUX (RBGX 1Z). FEMLUX is a subsidiary of Femsa-Madrid (RBGX 1Z).

217. Dr. Herman Scholl is the Vice President and a member of the board of directors of Femsa-Madrid (CX 90). He is currently a member of the board of management of Bosch GmbH and has been a member of that board since January 1975 (Bosch GmbH Int. No. 10 at p. 15).

218. Dr. Alfred Hetzel is a member of the board of directors of Femsa-Madrid (CX 90). He is currently a member of the board of management of Bosch GmbH and has been a member of that board since January 1972 (Bosch GmbH Int. No. 10 at 15).

219. Daniel Cuevas Ruiz is chairman of the board of directors of Femsa, Inc. He is also Femsa-Madrid's director of sales (RBGX 1B-C, R-S).

220. Joaquin Elola-Olaso Arraiza is a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Arraiza is Secretary and a member of the board of directors of Femsa-Madrid, in charge of finances (CX 90; RBGX 1S).

221. Ignacio Eguilior Y Puig De La Bellacasa is a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Bellacasa is an employee of Femsa-Madrid (RBGX 1S). **[40]**

222. Jose Manuel Perez Echeverria is the Executive Vice President and a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr.

[19] Bosch GmbH owns more than 50 percent of the stock of Bosch Internationale (Fiene 1329).

Echeverria was, until recently, in charge of Femsa-Madrid's activities outside of Spain (RBGX 1S).

223. Jose Luis Magica Yanguas is Secretary and a member of the board of directors of Femsa, Inc. (RBGX 2B). Mr. Yanguas is a member of the board of directors of Femsa-Madrid and is Femsa-Madrid's corporate lawyer (CX 90; RBGX 1S, 2C).

224. The president of Femsa, Inc. makes the policy and day-to-day operating decisions for that corporation (RBGX 1Z–27–28).

225. Femsa, Inc. has not been contacted in the course of its business by personnel from Bosch GmbH (RBGX 1Z–28).

226. Femsa, Inc. satisfies the warranty on the air conditioning compressors which it sells, not Femsa, Madrid (RBGX 1Z–11).

B. *Marketing Of Automotive Air Conditioning Compressors*

227. Bosch U.S. neither manufactures nor sells automotive air conditioning compressors (CX 88 p. 36).

228. Borg-Warner sells automotive air conditioner compressors through its York Division (Comp. and Borg-Warner Ans. ¶ 11).

229. In 1974, Femsa-Madrid bought the design rights to an automotive air conditioning compressor designed by Frederick E. Pokorny (RBGX 1F, I). Mr. Pokorny became an employee of Femsa-Madrid in 1974 (RBGX 1I). Mr. Pokorny became President of Femsa Inc. on its incorporation in 1976 (RBGX 1J).

230. Femsa, Inc. began selling automotive air conditioning compressors at the time of its incorporation in 1976 (RBGX 1 "O"; Finding 214).

231. Femsa, Inc. sells two piston in line automotive air conditioning compressors with three displacements (RBGX 1Z–6–7). This is the only type of air conditioning compressor which Femsa-Madrid manufactures (RBGX 1Z–7).

232. Such compressors are also manufactured by Tecumseh Products Company, York Division of Borg-Warner, two to three Japanese companies and Aspera Frigo Spa of Italy (RBGX 1Z–7).

233. At this time, there are no rotary automotive air conditioning compressors in production or commercially available (RBGX 1Z–8). **[41]**

234. Femsa, Inc. imports automotive air conditioning compressors, manufactured in Spain by Femsa-Madrid, which it resells in the aftermarket (RBGX 1N). Femsa-Madrid is the exclusive supplier to Femsa, Inc. of the air conditioning compressors which the latter resells (RBGX 1"O").

235. Femsa, Inc. distinguishes between the "aftermarket" and car manufacturers. Femsa, Inc. sells to manufacturers of air conditioning equipment for new or used cars sometimes at the manufacturer's

level which means that Femsa's customer has a contract with a car manufacturer to install air conditioning units in his cars (RBGX 1Z–9).

236. The York Division of Borg-Warner also supplies air conditioning compressors to such manufacturers of automotive air conditioning equipment (RBGX 1Z–10).

237. Femsa, Inc. has attempted to make sales to OEM manufacturers of vehicles *viz.,* to "Detroit" but has been unsuccessful (RBGX 1Z–10).

238. Femsa, Inc. does not sell automotive air conditioning compressors to warehouse distributors or automotive parts distributors (RBGX 1Z–31).

239. Femsa, Inc. sells automotive air conditioning compressors to the following customers, all located in Texas: Ara Inc., Frigiking, Midchill, Frigete, Estar, and Metrotex (Bosch GmbH Supplemental Ans. to Int. No. 29 p. 16 dated Oct. 10, 1979; *see also* RBGX 1Z–9).

240. Femsa, Inc.'s primary sales area is the Dallas, Arlington and Fort Worth, Texas area (RBGX 1Z–27).

241. The automotive air conditioning compressors sold by Femsa, Inc. will fit any American car that has bracketing made for it and any foreign car that has the physical space and an adapter to take the compressor (RBGX 1Q).

242. Femsa, Inc. sells its products under the trade name Femsa. Femsa, Inc. does not pay a royalty for use of the trade name (RBGX 1Z–11).

243. Femsa, Inc.'s sales of automotive air conditioner compressors have been approximately as follows:

1976:	0
1977:	$ 930,000
1978:	$2,873,000

244. There is insufficient evidence concerning control by Bosch GmbH over Femsa, Inc. or contacts between Bosch GmbH and [42] Femsa, Inc. to support a finding that Bosch GmbH competes with Borg-Warner in the sale of automotive air conditioning compressors or is engaged in commerce by virtue of the operations of Femsa, Inc. (Findings 214–26).

DISCUSSION

This is a proceeding under Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, challenging interlocking directorates between the Borg-Warner Corporation (Borg-Warner) and Robert Bosch GmbH (Bosch GmbH), a

German corporation, as well as the interlocking directorates between Robert Bosch Corporation (Bosch U.S.), a subsidiary of Bosch GmbH, and Borg-Warner.

There are four prerequisites which must be met before a violation of Section 8 is found. First, one of the interlocked corporations must have "capital surplus and undivided profits aggregating more than $1 million," second, the interlocked corporations must be engaged in commerce and third, the challenged interlock must be between two or more corporations "other than banks, banking associations, trust companies and common carriers." And finally, the interlocked corporations must be or have been competitors so that the elimination of competition by agreement between them would violate one of the antitrust laws.

The issues requiring resolution subsequent to the trial are as follows: (1) do Bosch GmbH and/or Bosch U.S. compete with the Borg-Warner Corporation in the sale of automobile replacement parts,[20] and hydraulic products; (2) do Bosch GmbH and Borg-Warner compete in the sale of automotive air conditioning compressors; (3) is Bosch GmbH engaged in commerce within the meaning of Section 8 of the Clayton Act by virtue of the operations of its subsidiary Bosch U.S. in the United States; (4) if competition between Bosch U.S.-Bosch GmbH and Borg-Warner is shown, is such competition de minimis; (5) if so, is the de minimis defense available under Section 8 of the Clayton Act; (6) does Section 8 of the Clayton Act reach indirect interlocks where companies compete indirectly through a subsidiary; and (7) in the event a Section 8 violation has not been proven are the challenged interlocks contrary to the public policy of Section 8 and thus within the proscription of Section 5 of the Federal Trade Commission Act? **[43]**

A. *Competition*

Respondents deny that competition exists between Borg-Warner and Bosch GmbH and/or the latter's subsidiaries in any of the three relevant product lines, namely, automotive replacement parts, hydraulic products and automotive air conditioning compressors. It was on this issue that most of the ligitation effort was expended.

1. Automotive Replacement Parts

Before turning to the applicable legal principles, a brief review of the record is in order.

Both Borg-Warner and Bosch U.S. sell automotive replacement parts in the American aftermarket through warehouse distributors (WDs) (Findings 87, 96–98). Borg-Warner sells automotive replace-

[20] The relevant products are ignition parts, wire and cable, and carburetor kits.

ment parts, including ignition parts, carburetor kits and wire and cable to so-called domestic or traditional WDs who resell to jobbers, who, in turn, resell either to garages or the consumer (Findings 62, 87). Borg-Warner had a full line of parts in the relevant products for application to domestically produced cars and a short line of parts for applications to imported or foreign made cars (Findings 85, 102). Bosch U.S. sells a full line of automotive parts for import car applications in the relevant product lines also to WDs (Finding 92). The thirty percent of Bosch U.S.'s WD customers, who account for 70 percent of its WD business, are specialists in import parts who do not resell parts for domestic applications (Findings 90, 97–98). On the other hand, 70 percent of Bosch U.S.'s customers are WDs in the domestic or "traditional" category who also sell import car parts. These domestic WDs accounted for approximately 30 percent or some $10 million of Bosch U.S.'s WD business in 1978 (Findings 90, 97–98). Borg-Warner sells to WDs in the same classification. Both respondents, moreover, are members of AWDA, a trade association of domestic WDs (Findings 73, 87, 96).[21] Bosch U.S. considers [44] membership in AWDA a means of securing new WD customers (Finding 73).

Borg-Warner began selling parts for import car applications as a result of "popular demand" from its domestic WD customers and offers them fast moving parts for popular import models in the relevant product lines (Finding 86). Bosch U.S., which has a full line for import car applications, also covers the fast moving parts for popular import car models (CX 17; Findings 82, 93, 112). Certain parts in the ignition lines of both Bosch U.S. and Borg-Warner may be used for the same applications in specific import car models (*E.g.,* Finding 111). Borg-Warner has wire and cable for a wide variety of foreign cars (Findings 136–37). In the case of the carburetor kit line, these products are produced by Borg-Warner under private label for Bosch U.S. and the coverage of both respondents is clearly comparable (Finding 124).

Borg-Warner in its catalogues expressly refers to its import car parts and both Borg-Warner and Bosch advertise their import car parts in trade magazines read by the entire industry including domestic WDs (CX 3; Findings 95, 112, 119–21, 136–37).

Respondents' primary contention is that complaint counsel has failed to show that the automotive parts lines of Borg-Warner and Bosch U.S. are substitutable, and if they are not, competition between them is impossible. The record does not show instances where the Borg-Warner line has been substituted for the Bosch line or visa versa

[21] Borg-Warner is listed in the 1979 AWDA directory, among other products, as a supplier of ignition parts, wire, cable, and carburetor kits. Bosch U.S. is listed in the same directory as a supplier, among other products, of ignition equipment for passenger cars and trucks (CX 85 p. 99). Bosch U.S.'s Master Catalogue lists ignition parts such as points, condensers, etc. together with ignition cable sets and carburetor tune-up kits (*See, e.g.,* CX 17Z–11).

(Finding 71). WDs do not buy automotive parts as such, they buy, the record shows, "lines" of parts. However, a WD may buy a short line or a full line. A supplier of a short line of fast moving parts can compete against a supplier with a full line. WDs do not necessarily buy a full line but have the option of purchasing short lines of fast moving parts. Domestic WDs selling parts for application to domestic cars and parts for application to imported cars have the choice of buying a fast moving line of import car parts for at least the more popular models from either Borg-Warner or Bosch U.S. (Findings 66, 77, 88, 132 n. 12).

The entire Bosch U.S. line would not be substitutable for the entire Borg-Warner line. Borg-Warner sells extensive lines of parts for domestic applications while Bosch U.S.'s automotive parts lines are, as a practical matter, limited to parts for [45] import car applications. This, however, does not resolve the point as respondents contend. As already noted, WDs do not necessarily buy all of the parts in a line; they can, if they so desire, concentrate on lines of fast moving parts for which they have a demand in their business. In this connection, the record shows that domestic WDs who sell import parts do have a choice of buying a line of fast moving parts in the relevant products for import car applications in the more popular car models from either Bosch U.S. or Borg-Warner. No additional evidence of competition is needed.

Respondents urge that analysis of the record on the basis of substitutability, product characteristics, patent or technology barriers, distinct supplier groups, distinct customers, different channels of distribution, separate marketing efforts and industry recognition, demonstrates that complaint counsel have failed to carry their burden of proof on the issue of competition as spelled out in *Brown Shoe Company* v. *United States,* 370 U.S. 294 (1962) and other relevant Section 7 precedents (RB 5–10).

Respondents' analysis is designed to show that Borg-Warner and Bosch U.S. sell in different markets. Bosch U.S., it is true, sells to WDs specializing in parts for import car applications to whom Borg-Warner does not sell. In defining a submarket of import car parts distributed through import car specialists, it may be significant that some Borg-Warner and Bosch U.S. parts, although they may be used for the same applications, have different physical characteristics; in that context it may also be significant that Bosch U.S. parts frequently are original equipment parts or meet such specifications, and that there is a preference for such parts among import specialists. For the purpose of defining a submarket, it may also be relevant that certain advertising is focused on one part of the overall market and not on others.

The existence of a separate submarket for sale of import car parts to WD import specialists is assumed for the sake of argument. But such a submarket, even if it exists, does not negate the fact that Bosch and Borg-Warner overlap in the sale or offering for sale to domestic WDs of the relevant products for popular import car applications and that domestic WDs have the choice of purchasing from Bosch U.S. or Borg-Warner in this area. This central fact outweighs testimony that Borg-Warner and Bosch U.S. did not perceive each other as competitors (*E.g.,* Reichers 646, 647–50; Wagner 1251).[22] **[46]**

In resolving the competition issue it is appropriate by way of "analogy" to draw on concepts applied under Section 7 of the Clayton Act. However, such criteria are not to be used "'to obscure competition but to recognize competition where in fact competition exists.' " *TRW Inc.,* 93 F.T.C. 325, 380 (1975) citing *United States* v. *Continental Can Co.,* 378 U.S. 441, 453 (1964). The kind of product market definition called for in a merger or monopolization case is not relevant to a Section 8 proceeding. *See Protectoseal Co.* v. *Barancik,* 484 F.2d 585, 589 (7th Cir. 1973). Analysis of the level of competition in specific submarkets is appropriate under Section 7, where the focus is not merely on the existence of competition, but also on the impact on competition of the challenged mergers. Since there is no competitive effects test under Section 8, there is no need for a precise definition of the metes and bounds of the relevant market under that statute.

In a Section 8 proceeding the focus of analysis is on the existence of competition between the two firms involved in the interlock. The fact that one firm may compete in a submarket in which the other does not compete cannot vitiate evidence of competition between the two firms with respect to a substantial group of customers outside that submarket. The existence of different submarkets for the relevant product lines has no relevance to a Section 8 proceeding where the two interlocked firms offered a choice for a substantial group of customers in the overall market. It is the ability of customers to choose between different suppliers which is the essence of competition. *See United States* v. *El Paso Gas Co.,* 376 U.S. 651, 661 (1964). Applying that test, Borg-Warner and Bosch U.S. competed in the sale of automotive replacement parts within the meaning of the statute.

2. The De Minimis Issue

Respondents also argue that even if competition has been shown by the record that the case should be dismissed because such competition is at best de minimis. The record does not permit quantification with any degree of precision as to the overlap in the sale of import car parts

[22] Nor, under the circumstances, can the finding on this point be overcome by the characterization by a WD, who carries both, of the Bosch U.S. and Borg-Warner lines as complementary (Finding 77).

in the relevant product lines to domestic WDs by Borg-Warner and Bosch U.S. The question therefore arises whether de minimis is properly a [47] defense in a Section 8 proceeding once competition has been established. Precedent may be found to support either position. *Compare Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.,* 1966 Trade Cases ¶ 71,678 (S.D.N.Y. 1966) with *United States* v. *Sears, Roebuck & Co.,* 111 F.Supp. 614 (S.D.N.Y. 1953) and *United States* v. *Crocker National Corp.,* 422 F.Supp. 686 (N.D. Ca. 1976).

The starting part of the analysis is that Section 8 is a statute designed to prevent incipient antitrust violations by removing the opportunity or temptation for such violations through interlocking directorates. *Crocker National Corp.,* 422 F.Supp. at 703; *Sears, Roebuck & Co.,* 111 F.Supp. at 616. To achieve that objective Congress sought to avoid questions as to whether the competition which the interlocking directorates could potentially restrain was substantial or de minimis. *Crocker National Corp.,* 422 F.Supp. at 703. Buttressing this conclusion is the fact that the statute already contains a substantiality requirement specifying that at least one of the corporations must have capital, surplus and undivided profits aggregating more than $1 million.[23] Considering the fact that the statute already contains a substantiality requirement, separate and apart from competitive overlap, and the further fact that Section 8 is an incipiency statute, it follows that de minimis is not a defense once competition between the interlocked firms has been established.

This conclusion is further reinforced by the so-called "so that" clause of the statute: [48]

> [N]o person at the same time shall be a director in any two or more corporations. . . . if such corporations are or shall have been theretofore . . . competitors, *so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.* . . . [emphasis added].

The "so that" clause encompasses price fixing agreements which are *per se* illegal irrespective of the amount of commerce involved.[24] Re-

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[23] . . . The vital distinction between § 7 and § 8, however, is that the latter omits the § 7 test and promulgates its own substantiality standard in the form of the one million dollar size requirement. The omission of "substantially to lessen competition, or to tend to create a monopoly" from § 8 in contradistinction to its inclusion in § 7 and other sections of the same Act may not be deemed inadvertent. Were the defendants' construction to be adopted, it would require the application under § 8 of a test which Congress appears deliberately to have omitted. *Sears, Roebuck & Co.,* 111 F.Supp. at 619.

[24] *See* Kramer "Interlocking Directors and the Clayton Act After 35 Years," 59 Yale L.J. 1266, 1269 (1950). As the court held in *Crocker National Corp.,* 422 F.Supp. at 703:

> An examination of the relevant statutory language set forth above reveals that *the "so that" clause does not purport on its face to be, and is in fact not, a definition of the term competitors.* Moreover, were that clause to be interpreted as defining the term "competitors", it would lead to the analogous result of declaring companies with vertical relationships, such as manufacturers and distributors, to be competitors.
>
> The real purpose of the "so that" clause seems to have been the establishment of a *per se* rule that interlocking directorates among competing corporations (that otherwise meet the requirements of the fourth paragraph of Section 8) are illegal. . . . [emphasis added].

spondents contention on the de minimis defense must be rejected on that score alone.

Respondents cite two consent orders issued pursuant to Section 8 in support of their de minimis argument. *Kraftco Corp.,* 88 F.T.C. 362 (1976) and *IBM Corp.,* 89 F.T.C. 91 (1977). In *Kraftco,* directors were required to list only those potential interlocks exceeding $1 million per year. The *IBM* order covers only those situations in which the competitive products and services are "in excess of either one-half of one percent (.5%) of [a] company's most recent annual gross revenues or $5,000,000, [**49**] whichever is the lesser." Exclusions of this nature are apparently designed to eliminate de minimis situations from the coverage of such orders (*See* staff memorandum dated Feb. 3, 1975 attached as Appendix A to Respondent's Joint Brief).

The consent orders are not controlling, for "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *du Pont & Co.,* 366 U.S. 316, 330 n. 12 (1961). At best, these orders appear to be an administrative decision on part of the Commission as to how to allocate its resources in this area. They do not evidence an attempt by the Commission to construe the scope of Section 8 in relation to the de minimis issue. In short, these provisions in *IBM Corp.* and *Kraftco* appear to be no more than exercise of the Commission's discretion in determining when it would be in the public interest to enforce the orders in question. Administrative law judges, however, are not empowered to dismiss complaints where to do so would infringe on the Commission's exercise of administrative discretion. *Compare* the Commission's "order affirming the initial decision of the Administrative Law Judge granting complaint counsel's motion for dismissal" *Century 21 Commodore Plaza Inc.,* (95 F.T.C. 808, June 9, 1980). This argument is more properly addressed to the Commission.

3. Hydraulic Products

The record does not sustain a finding that Borg-Warner competed with Bosch GmbH or Bosch U.S. in the sale of hydraulic products.

The salient facts are as follows: Borg-Warner and Bosch GmbH-Bosch U.S. in the relevant period[25] produced and marketed hydraulic gear pumps, motors, and valves (Findings 172, 185). Borg-Warner sold its hydraulic products exclusively in the mobile sector of the hydraulics market. Bosch U.S., on the other hand, sold such products primarily to the industrial sector, making possibly 40 percent of its sales to the mobile part of the market (Findings 177, 188–91, 204). Borg-Warner hydraulic valves, pumps, and motors perform the same functions as Bosch valves, pumps and motors. However, physically,

[25] Borg-Warner sold off its hydraulics business in July '79 (Finding 179).

they are different in terms of their dimensions, mountings and the fact that the Borg-Warner parts have fittings in inches while those of Bosch are generally metric. The performance characteristics [50] of Bosch's and Borg-Warner's products also differ significantly. The Borg-Warner valves and pumps are designed to be installed in low pressure/high volume systems while the Bosch products are designed for high pressure/low volume use; high pressure components moreover are more expensive. Because of such physical differences and varying performance characteristics the Bosch components are not interchangeable with Borg-Warner hydraulic parts (Findings 195–200).

Most mobile original equipment manufacturers (OEMs) design their own hydraulic system. A low pressure hydraulic system can be designed to perform the same function as a high pressure design system. To that extent, it is conceivable that Bosch U.S. and Borg-Warner could compete for sales of hydraulic parts to OEMs in the mobile hydraulics market at the design or specifications stage (Findings 166, 170, 201). The record, however, contains no concrete instances of competition between respondents at the design or specification stage for any particular customer. There is no way of determining from the record the circumstances under which a domestic OEM, ordinarily oriented to low pressure systems, would design a system to incorporate Bosch's high pressure parts (Finding 209).[26] Accordingly, a finding that Bosch U.S. and Borg-Warner competed in the sale of hydraulic parts to the mobile sector of the hydraulics market at the design or specifications stage would be conjectural.[27]

In Europe, Borg-Warner's hydraulic sales were essentially confined to sales of U.S. design (low pressure) hydraulic [51] products to production facilities of U.S. companies overseas (Findings 178, 212). Bosch apparently also made sales of "hydraulic components" to U.S. OEMs manufacturing mobile equipment in Europe which was imported into the United States. The record is unclear as to the precise nature of the components sold (Finding 192). In any event, as in the case of the U.S. sales, there is insufficient information that Bosch and Borg-Warner competed in the design or specification stage for such business (*See* Finding 209). The evidence does not permit a determina-

[26] In *TRW*, 93 F.T.C. at 380 *et seq.*, the Commission, in resolving the competition issue on analogous facts, had before it concrete instances of how product differences could be overcome in order to compete for the business of specific competitors.

[27] There is evidence that both Borg-Warner and Bosch U.S.-Bosch GmbH sold hydraulic products to Massey-Ferguson (Findings 190, 206). However, as far as can be determined from this record, the Bosch products purchased by Massey-Ferguson were not offered by Borg-Warner.

Similarly, it appears Bosch U.S. and Borg-Warner both made sales to Fauver Company, a distributor. However, the record shows that Bosch's sales to distributors were of products such as accumulators not offered by Borg-Warner or industrial valves or gear pumps (Findings 189, 193). Borg-Warner, on the other hand, sold valves or gear pumps to distributors for replacement parts for original mobile equipment (Finding 177). Borg-Warner made no effort to serve the industrial segment of the hydraulics market through distributors (Trauscht 1155).

tion of whether Bosch GmbH competed with Borg-Warner for such business overseas.

Complaint counsel, in urging that competition between respondents in the hydraulics market has been proven, rely heavily on documents, generally from the period 1976–78, originally from respondents' files. These indicate that the gear pump lines of Bosch and Borg-Warner are similar and that in mobile equipment valves their lines conflict (CX 36A, C); that there is a "direct confrontation" in a certain section of the production programs of the two companies in "part of the gear pump range" (CX 37A-B); and that the Borg-Warner gear pump range and the Bosch range in the case of certain gear pumps" are very similar" (CX 74J). Certain Borg-Warner memoranda list Bosch as a foreign or European competitor in hydraulic valves and pumps or simply as a competitor (CX 76F, J, 77P *in camera;* 80C, H-I). Other documents pertain to the possibility or discussion of cooperation in the hydraulics market (*E.g.,* CX 44A-B, *in camera,* 66D).

Contrary to respondents' contentions, the documents are admissible under *Lenox, Inc.,* 73 F.T.C. 578 (1968), *aff'd in part and modified in part on other grounds,* 417 F.2d 126 (2nd Cir. 1969). Contemporaneous documents from a party's files as a general rule are entitled to considerable weight. However, the fact that the documents are admissible under *Lenox* does not mean that all statements or expressions of opinion contained therein are necessarily conclusive. Where there is a conflict such evidence must be weighed like any other. Here, the opinions and statements indicating that Bosch competed with Borg-Warner require further explanation, in light of the evidence adduced by respondents, so that their basis can be determined. It is difficult to determine, without testimony from the authors of such documents, how much weight they gave to other facts of record which might lead to a contrary conclusion such as significant differences involving the physical and performance characteristics of the Bosch and Borg-Warner products.

The case presents an unresolved issue as to whether Borg-Warner competed with Bosch GmbH and Bosch U.S. in the sale of hydraulic products to mobile equipment OEMs at the design or specification stage. Prerequisite to a definitive resolution of this question would be the testimony of such OEMs as to the **[52]** relevant considerations in determining at the design stage whether to utilize a high pressure or low pressure system as well as the testimony of the former respondent officials who wrote documents such as CX 36, 37, etc.[28]

[28] Clearly, a decision in designing mobile equipment on whether to install or design a low pressure or high pressure hydraulic system involves considerations which are more complex and sophisticated than those involved in determining whether to install a "universal" or a "custom" ignition set as a replacement part in an automobile.

4. Automotive Air Conditioning Compressors

Neither Bosch GmbH nor Bosch U.S. sell automotive air conditioning compressors in the United States. Femsa, Inc., which does make such sales, is a subsidiary of Fabrica Espanola Maguetos (Femsa-Madrid). Femsa-Madrid is in turn owned 17 percent by Bosch GmbH and 34 percent by Bosch Internationale in which Bosch GmbH holds a controlling interest. The record which shows no contacts between Bosch GmbH and Femsa, Inc.[29] will not support a finding that Bosch GmbH either controls or has the power to control Femsa, Inc. (Findings 214–26). Accordingly, no finding is made that Bosch GmbH competes with Borg-Warner or is engaged in commerce by virtue of Femsa, Inc.'s operations.

5. The Indirect Interlock And Commerce Issues

Respondents assert that Section 8 of the Clayton Act prohibits only "direct" interlocks between corporations which are themselves in direct competition, and that competition between the interlocked firms cannot be found on the basis of a parent subsidiary relationship. Respondents therefore urge that the charges based on the positions of Dr. Merkle and Dr. Bacher with Bosch GmbH cannot be sustained. The contention is rejected.

The Second Circuit in *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2nd Cir. 1978), on which respondents rely, held that there is no general rule under Section 8 prohibiting interlocks between parent companies whose subsidiaries compete. The court left open, however, the question of application of the Act to situations where the parent company closely controls and dictates the policies of its subsidiary. [53]

The authorities conflict but *see* Kramer, "Interlocking Directorships and the Clayton Act After 35 Years," 59 Yale L.J. *supra* at 1268 n. 11:

> . . . [w]here the major policies of the subsidiaries are dictated by the parents, it would seem there is a strong case for holding the directorships unlawful. . . .

Cited in *United States* v. *Cleveland Trust Company,* 392 F.Supp. 699, 712 (N.D. Ohio 1974).

To achieve the statutory objective of preventing incipient antitrust violations by removing the opportunity or temptation for such acts, it is clearly necessary to prevent indirect interlocks at least in those situations where the parent controls or has the power to control its subsidiary's major business decisions. The determination of whether

[29] The record shows that two of Femsa-Madrid's directors also sit on the board of Bosch GmbH.

sufficient control exists is to be decided on a case by case basis. *See Cleveland Trust Co.* The evidence as to parent subsidiary control and contacts relevant to the indirect interlock issue is also dispositive of the commerce issue. This evidence will be considered below in connection with both questions.

Bosch GmbH and the individual respondents urge that Bosch GmbH is not "engaged in whole or in part in commerce" within the meaning of Section 8 of the Clayton Act. This argument is interrelated with respondents' contention that the interlocked corporations must be in direct competition, a requirement which they assert is not met by an indirect interlock, involving a subsidiary corporation.

It is undisputed that Bosch U.S. is engaged in commerce within the meaning of Section 8. The question of whether Bosch GmbH is engaged in commerce by virtue of the business and operations of its subsidiary Bosch U.S. is therefore squarely presented. There is no dispute that the criteria for determining whether a corporation is engaged in commerce are the same for Sections 7 and 8 of the Clayton Act.

Relying primarily on *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975), respondents urge Bosch GmbH is not "directly" engaged in the sale, distribution or acquisition of goods in United States commerce and therefore is not engaged in commerce within the meaning of the Clayton Act. This construction of American Building Maintenance has, previously been rejected. **[54]**

. . . Respondents rather crabbed interpretation of the Court's language in *American Building,* that "a corporation must itself be directly engaged . . . in interstate commerce," finds no support in that decision. Nowhere in that case is there the slightest hint that a corporation operating through its subsidiaries, which in turn are admittedly involved in interstate commerce falls outside the reach of Section 7 because it is not deemed to be "engaged in commerce." *Jim Walter Corp.,* 90 F.T.C. at 671, 740 (1977).

Dispositive of the question are two decisions under Section 7 holding that where the requisite degree of control exists, a parent may be found to be engaged in commerce by virtue of a subsidiary's operations. *Jim Walter Corp.,* 90 F.T.C. 671 (1977); *United States* v. *Jos. Schlitz Brewing Company,* 253 F.Supp. 129 (N.D. Cal. 1966), *aff'd,* 385 U.S. 37 (1966), *reh. denied,* 385 U.S. 1021 (1967).

Strict adherence to common law principles is not required in determining whether a parent should be held for the acts of its subsidiary, where the public interest is involved in the enforcement of the Federal Trade Commission or Clayton Acts. *Jim Walter Corp.,* 90 F.T.C. at 735. Nor is overt intervention in the day-to-day activities of the subsidiary prerequisite to finding the parent company responsible for the acts of the former:

Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *North American Co.* v. *SEC,* 327 U.S. 686, 693.

Latent control alone is sufficient to hold the parent liable for its subsidiary's acts. *Beneficial Corp.,* 86 F.T.C. 119, 159 (1975), *rev'd in part on other grounds,* 542 F.2d 611 (3rd Cir. 1976). *See also USLIFE Credit Corp.,* 91 F.T.C. 984, 1034 (1978).

Bosch GmbH directly and indirectly wholly owns Bosch U.S.; Bosch GmbH and its subsidiaries, in which Bosch GmbH holds a controlling interest, nominate and elect the directors of Bosch [55] U.S. (Findings 35–36); there is an overlap between parent and subsidiary in the case of four out of twelve of Bosch U.S.'s directors (Finding 37). There is also an overlap in the officers and directors of Bosch U.S. and Robert Bosch North America Inc., a Bosch GmbH subsidiary which functions as a holding company for its parent (Findings 35, 38–39). Approximately 100 of Bosch U.S.'s 1,500 employees are former employees of Bosch GmbH; Bosch U.S. hires employees of its parent when the necessary skills are not available in the United States (Finding 41). Three of Bosch U.S.'s corporate officers were formerly employees of Bosch GmbH or other Bosch affiliates (Findings 42–45). Five of the 15 employees of Robert Bosch North America are simultaneously employed by Bosch U.S. and the office space of Robert Bosch North America is a "contiguous part of the overall [Bosch U.S.] real estate" (Finding 45). Bosch U.S.'s current president was employed in 1973 as a consultant by Bosch GmbH for North American activities to evaluate business opportunities, to become involved in licensing opportunities, potential new business ventures "and also to collaborate with the existing corporation Robert Bosch Corporation [Bosch U.S.]." He assumed his position as president of Bosch U.S. in 1974 (Finding 40). Bosch GmbH established the subsidiary to market its products in the United States; Bosch U.S. sells the relevant products under the Bosch trademark; Bosch U.S. is the only U.S. firm licensed to use its parent's trademarks (Finding 55); Bosch U.S. discusses with Bosch GmbH what products should be introduced in the subsidiary's market, although on occasion the subsidiary has rejected the parent's suggestion for the introduction of certain products (Finding 48); Bosch GmbH has made capital contributions to the business of Bosch U.S. to pay for facilities in order to start new programs; Bosch GmbH has communicated with the subsidiary concerning major proposed expenditures (Findings 53–54); Bosch U.S. submits financial reports, forecasts, operating results, balance sheets and business plans to Bosch GmbH (Finding 46); in hydaulics sales to a major customer the

parent and subsidiary collaborated on engineering and specification requirements, such collaboration being "tied into again [the] Bosch relationship worldwide with Massey-Ferguson, trying to achieve uniform application and interchangeability" (Finding 56); Borg-Warner officials had a business discussion with a Bosch GmbH official in charge of the automotive aftermarket outside of Europe talking "in particular about Bosch's aftermarket activities in the United States" (Finding 57); Bosch U.S. is responsible for warranty service on automotive equipment in the United States, with respect to which Bosch GmbH represents that it has a worldwide "Service Network", and the parent company handles such matters in close cooperation with those responsible in countries other than Germany (Finding 59); Bosch GmbH officials suggested to Borg-Warner discussion of a "joint action plan" concerning the hydraulics market in the [**56**] United States[30] and other areas (Finding 60). Other discussions or contemplated discussions concerning cooperation between Bosch GmbH and Borg-Warner also involved the business of Bosch U.S. (Finding 57).

Bosch GmbH had the power by virtue of stock ownership and interlocking directorships to control the affairs of its subsidiary; parent subsidiary discussions concerning major expenditures demonstrates the power to control the subsidiary's marketing decisions as did the facts of record showing that Bosch U.S.'s affairs were subject to coordination with the multinational business of the Bosch Group (*E.g.*, Findings 40, 56–60).

The record demonstrates the requisite degree of control by Bosch GmbH over the subsidiary so as to bring it within the purview of Section 8 of the Clayton Act. Bosch GmbH had the power, whether or not exercised, to influence or control those decisions which might involve violations of the antitrust laws. The totality of these factors is sufficient to bring this case within the rule of *Jim Walter* and *Jos. Schlitz*. Bosch GmbH by virtue of its control over and contacts with Bosch U.S. is engaged in commerce within the meaning of Section 8 of the Clayton Act. On the same basis, Bosch GmbH is found to compete with Borg-Warner in the sale of the relevant automotive replacement parts by virtue of the operations of Bosch U.S.

6. Applicability Of Section 5

If, contrary to the conclusions reached herein, indirect interlocks are not within the proscription of Section 8, they are nevertheless subject to Section 5 of the Federal Trade Commission Act. One of the objectives of Section 5 is to halt in their incipiency violations of the Sherman and Clayton Acts before such practices become full fledged violations of those statutes. As the Supreme Court held:

[30] Bosch U.S. is responsible for marketing of Bosch's hydraulic products in the United States.

. . . [t]he Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . ., as well as to condemn as [57] "unfair methods of competition" existing violations of them. . . .

FTC v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394 (1953). Put another way, " . . . the Commission has power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation . . . of the Clayton Act or other provisions of the antitrust laws." *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 322 (1966). Section 5, moreover, authorizes the Commission to suppress as unfair methods of competition acts counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457, 463 (1941).

The Commission may exercise that power where the practices are inconsistent with the Clayton Act although not technically within one the specific prohibitions of the statute. *Grand Union Co.* v. *FTC,* 300 F.2d 92, 99 (2nd Cir. 1962). *Kraftco Corp.,* 89 F.T.C. 46, 63–64 (1977), *rev'd. on other grounds,* 565 F.2d 807 (2nd Cir. 1977); *Perpetual Federal Savings & Loan Assoc.,* 90 F.T.C. 608, 652–57 (1977), *withdrawn,* 3 Trade Reg. Rep. ¶ 21,609 (1979) [94 F.T.C. 401]. The Commission, moreover, need not prove injury to competition where it proceeds under Section 5 against acts contrary to the policy of a Section of the Clayton Act which itself is a *per se* statute. *Grand Union Co.,* 300 F.2d at 99. Accordingly, if contrary to the conclusion reached here, indirect interlocks are not within the technical confines of Section 8, then they can be reached under Section 5 to effectuate the public policy of the Clayton Act. Indirect interlocks where the parent company has the power, whether or not exercised, to influence or control those decisions of the subsidiary which might involve antitrust violations are surely counter to the policy of Section 8.

Similarly, if contrary to the conclusions reached herein, Bosch GmbH is not engaged in commerce within the meaning of the Clayton Act, the record is sufficient to bring Bosch GmbH within the standard of Section 5, namely "in or affecting commerce."

Remedy

An order will issue prohibiting a continuation of the interlocks between Borg-Warner and Bosch GmbH and Bosch U.S. as long as these corporations or their subsidiaries compete. The order will also prohibit interlocking directorates between respondents and other corporations with whom they compete. However, in the case of Bosch GmbH and Bosch U.S., a limitation of the provision to prohibitions on

interlocks with competing corporations engaged in commerce "within the United States" is warranted. [58]

Complaint counsel also seek a prohibition barring any director, officer, or employee with management functions or any representative of Bosch GmbH or any of its subsidiaries from serving on the board of directors of Borg-Warner. Complaint counsel urge that such a provision is necessary to make the order effective. Such a provision will not issue. The violation found is a narrow one. The government's case, relying on the *per se* nature of Section 8, is limited to a showing that the elements of the statute have been met. The record does not permit an evaluation of the competitive effects of the arrangements. Under the circumstances, the evidence justifies no more than a ban on interlocking directorates. *See TRW, Inc.,* 93 F.T.C. at 387.

The presence of Dr. Merkle and Dr. Bacher on the boards of Borg-Warner, Bosch GmbH, and Bosch U.S. also constitutes a violation of Section 5 of the Federal Trade Commission Act. A broader order is not warranted for that reason since the instant Section 5 case is based simply on the Section 8 violation or a showing that the practices complained of violate the policy of that statute if all the technical elements of the Section 8 provision have not been demonstrated. To justify a broader order under Section 5, it would be necessary to demonstrate that respondents had committed unfair acts and practices going beyond a violation of Section 8 or the spirit of that Act. No such finding can be made on this narrowly based record.[31]

Nor is such a provision warranted by the fact that Bosch GmbH and Borg-Warner in connection with Bosch's stock acquisition of the latter's stock had engaged in extensive discussions for future cooperation or joint activities which might benefit both corporations. The Commission had two alternatives in addition to the course followed in this proceeding. It could have charged the stock acquisition as illegal under Section 7 of the Clayton Act and/or it could have charged that such discussions arising out of or related to the stock acquisition were unfair methods of competition. Such a course under either statute would have required some evidence of the impact or probable impact on competition of the stock acquisition or such discussions. The case was not tried on that [59] basis. Accordingly, there is no justification on that score for prohibitions going beyond a ban on interlocking directorates as provided in Section 8 of the Clayton Act.

[31] *Central Linen Service Company,* 64 F.T.C. 1307, 1349, 1356 (1964) did issue an order containing a provision such as the one which complaint counsel request. However, it should be noted that in that Section 5 proceeding, the complaint alleged and the record showed a conspiracy to allocate customers. No such evidence is contained in this record.

Conclusions

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and the respondents.

2. The complaint herein states a cause of action and the proceeding is in the public interest.

3. The interlocking directorates between Bosch GmbH and Borg-Warner and Bosch U.S. and Borg-Warner violate Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Order

The following definitions shall apply in this order:

Subsidiary of a corporation means any other corporation of which 50 percent or more of the voting stock is owned or controlled, directly or indirectly, by such corporation.

Parent of a corporation means any other corporation which owns or controls 50 percent or more of the voting stock, directly or indirectly, of such corporation.

Sister of a corporation means any subsidiary of the parent of such corporation.

I.

It is ordered, That respondents Hans L. Merkle and Hans Bacher shall forthwith cease and desist from serving on the board of directors of Borg-Warner or on the board of management and boards of directors of Bosch GmbH and all of its subsidiaries and shall forthwith withdraw from participation in the direction, control or conduct of the business of the corporation(s) from which each resigns. **[60]**

II.

It is further ordered, That respondent Borg-Warner and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their boards of directors any individual who either:

(a) serves at the same time on the board of management and/or boards of directors of Bosch GmbH or any of its subsidiaries, so long as Borg-Warner competes with Bosch GmbH or any of its subsidiaries in the production or sale of any product or service; or

(b) serves at the same time on the board of directors of any other corporation (other than a subsidiary, parent or sister of Borg-Warner)

which competes with Borg-Warner in the production or sale of any product or service; or

(c) fails to submit to Borg-Warner any statement required by Paragraph IV of this order to be obtained by Borg-Warner.

III.

It is further ordered, That respondents Bosch GmbH and Bosch U.S. and their successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their boards of management and boards of directors any individual who either:

(a) serves at the same time on the board of directors of Borg-Warner so long as Bosch GmbH or Bosch U.S. or any of their subsidiaries or parent corporations compete with Borg-Warner in the production or sale of any product or service; or

(b) serves at the same time on the board of directors of any other corporation engaged in commerce within the United States (other than a subsidiary, parent or sister of Bosch GmbH or Bosch U.S.) which competes with Bosch GmbH or **[61]** Bosch U.S. or any of their subsidiaries or parent corporations; or

(c) fails to submit to Bosch GmbH or Bosch U.S. any statement required by Paragraph IV of this order to be obtained by Bosch GmbH or Bosch U.S.

IV.

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall obtain a written, certified statement from each member of their board of directors or board of management (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship or seat on the board of management (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director at the time of the statement.

Provided, however, That in complying with the provisions of Paragraph IV(b), the information to be furnished by Bosch GmbH concern-

ing its directors may be limited to those corporations engaged in commerce within the United States and those products and services sold or offered for sale by such corporations within the United States.

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under Paragraphs II(a) and III(a) above due to any error or omission contained in any written statement received pursuant to this paragraph. **[62]**

V.

It is further ordered, That within forty-five (45) days of the effective date of this order, and annually for a period of ten (10) years thereafter, respondents Borg-Warner, Bosch GmbH and Bosch U.S. shall file with the Commission separate, written reports setting forth in detail the manner and form in which each has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph.

Nothing in this paragraph shall relieve respondents Borg-Warner, Bosch GmbH and Bosch U.S. of their obligations to comply with Paragraphs II, III, and VI of this order once they are no longer required to submit reports of compliance to the Commission.

VI.

It is further ordered, That respondents Borg-Warner, Bosch GmbH and Bosch U.S. shall notify the Commission at least thirty (30) days prior to any change in the corporations or in their relationships to each other such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

APPENDIX A

Abbreviations Used

Ans. Par. – Paragraph of the Answer
Comp. Par. – Paragraph of the Complaint
RA – Response to Request For Admissions
Int. – Response to Interrogatories
RB – Respondents Joint Brief

CX – Commission Exhibits
Tr. – Transcript
BWX – Borg-Warner Exhibits
RBUSX – Bosch U.S. Exhibits
RBGX – Bosch GmbH Exhibits

Opinion of the Commission

By Bailey, *Commissioner:*

The Commission issued a complaint on November 7, 1978, charging three corporations and two individuals with violating Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint alleged interlocking directorates between competing corporations.

The respondents in this proceeding are Borg-Warner Corporation, a Delaware corporation with its principal office in Chicago, Illinois; Robert Bosch GmbH ("Bosch GmbH"), a limited liability company organized under the laws of the Federal Republic of Germany; Robert Bosch Corporation ("Bosch U.S."), a New York corporation with its principal office in Broadview, Illinois, and a wholly owned Bosch GmbH subsidiary; and Dr. Hans L. Merkle and Dr. Hans Bacher, residents of the Federal Republic of Germany and the directors in question. The complaint alleged that Borg-Warner competed with Bosch U.S. in the sale of automotive ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air [2] conditioner compressors, hydraulic valves, and hydraulic gear pumps and motors, and that the presence of Messrs. Merkle and Bacher on the boards of Borg-Warner and Bosch U.S. was thus a violation of Section 8. The complaint also alleged that Bosch GmbH was similarly a competitor of Borg-Warner; complaint counsel argued at trial that although Bosch GmbH itself made no sales in competition with Borg-Warner, the degree of control exercised by Bosch GmbH over Bosch U.S. warranted imputing the subsidiary's sales to the parent corporation for purposes of Section 8 and finding that the presence of these two directors on the boards of both Borg-Warner and Bosch GmbH was an unlawful interlock as well.[1]

In an initial decision filed June 30, 1980, Administrative Law Judge ("ALJ") Theodor P. von Brand found that Borg-Warner competed with Bosch U.S. and Bosch GmbH in the United States in the sale of "fast-moving" automotive ignition parts, wire and cable products, and carburetor tune-up kits with application on imported cars. All re-

[1] After the trial, respondents notified the ALJ that Messrs. Bacher and Merkle were no longer serving on the board of Bosch U.S. *See* Letter from Joseph A. McManus, Esq., to ALJ von Brand, *ex parte*, Feb. 4, 1980. Thus, only the interlock between Borg-Warner and Bosch GmbH continued after that date.

spondents, therefore, were found in violation of Section 8 of the Clayton Act and Section 5 of the FTC Act. The complaint was dismissed with respect to allegations that respondent corporations competed in hydraulic products and automotive air conditioner compressors. The ALJ entered an order requiring Messrs. Merkle and Bacher to remove themselves from either the board of Borg-Warner or the boards of both Bosch U.S. and Bosch GmbH. The order barred interlocking directorates between Borg-Warner and either of the two Bosch entities in any product lines in perpetuity, with strict and long-lasting (ten-year) reporting requirements. Both sides have filed appeals. Subsequent to the argument of this matter on appeal, counsel for Hans Bacher notified the Commission of Dr. Bacher's death.

I. BACKGROUND

A. *The Automotive Parts Aftermarkets*

Complaint counsel alleged that Borg-Warner and Bosch U.S. competed in the aftermarket for certain foreign-car parts. The aftermarket is the market for replacement parts, that is, parts intended for ultimate use in automotive repairs (*see* I.D. 43; [3] I.D.F. 62–98).[2] According to the record in this case, distribution in the aftermarket takes place at three levels. Suppliers such as Borg-Warner and Bosch U.S. sell lines of parts to warehouse distributors ("WD's"), who are authorized by the suppliers to resell one or more lines as intermediate wholesalers. WD's maintain inventories of vehicle parts for resale to local "jobbers," and in exchange for this service suppliers grant WD's a discount from the jobber price. Jobbers serve as wholesalers to retail outlets such as garages and service stations, and sometimes jobbers make retail sales to consumers (I.D.F. 62).

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[2] The following abbreviations will be used in this opinion:

I.D.	– Initial Decision Page Number
I.D.F.	– Initial Decision Finding Number
Tr.	– Transcript Page Number, followed by witness' name
Int. No.	– Response to Interrogatory Number, preceded by responding party's name
RA	– Response to Request for Admission Number, preceded by responding party's name
CX	– Complaint Counsel's Exhibit Number
CPF	– Complaint Counsel's Proposed Finding
CAB	– Complaint Counsel's Appeal Brief
CAAB	– Complaint Counsel's Appellate Answering Brief
CARB	– Complaint Counsel's Appellate Reply Brief
BWX	– Borg-Warner Exhibit Number
RBUSX	– Bosch U.S. Exhibit Number
RPF	– Respondents' Proposed Findings
RB	– Respondents' Joint Brief, Apr. 1, 1980
RAB	– Respondents' Joint Appeal Brief
RAIB	– Respondents Bosch GmbH, Merkle & Bacher's Brief on Indirect Interlocks
RAAB	– Respondents' Joint Appellate Answering Brief
RARB	– Respondents' Joint Appellate Reply Brief
RACB	– Respondents' Joint Appellate Reply Brief on the Competition Issue
RMD	– Respondents' Motion to Dismiss, Dec. 14, 1981.

Suppliers do not sell individual parts to WD's but sell groups of related items known as "lines" of parts. Among these are lines of ignition parts, wire and cable products, and carburetor kits (*see* Tr., Reichers 622–23; I.D.F. 62–63). A line of parts is defined in the industry as the parts "necessary to supply and complete the function of a specific phase of operation within the vehicle" (*id.*). No manufacturer, however, produces a line containing every single part with application on all foreign-made vehicles or on all domestically produced vehicles (Tr., Nelson 498–99; I.D.F. 67). Indeed, manufacturers generally offer either a "full line" of parts, which has all parts in the relevant category necessary to repair the great majority of cars estimated to be in service in a particular area (Tr., Weber 861; [4] Wagner 1223–24; I.D.F. 64); or a "short line" of parts, a series of only high-turnover or "fast-moving" items in a specific category (Tr., Weber 861; I.D.F. 65).

The wholesalers in the automotive parts aftermarket generally have been characterized in this proceeding as "traditional" ("domestic") or "import specialist" WD's and jobbers. Traditional WD's principally stock replacement parts for domestic-made vehicles, but often stock a more limited number of parts for foreign-made vehicles (*see* Tr., Reichers 626; I.D.F. 72). Import specialist WD's handle foreign car parts and do not sell domestic car parts (Tr., Wagner 1232; I.D.F. 75), which seems to be a tradition held over from years when only these distributors sold replacement parts for the then-limited number of imported cars in this country. Jobbers who buy from WD's may specialize in domestic or foreign parts (Tr., Wildermuth 1396; Wagner 1232; I.D.F. 79), but it is not unusual for domestic jobbers to carry parts for the more popular foreign cars (Tr., Weber 846–47; I.D.F. 80–81), and some jobbers sell full lines of both domestic and imported parts (Tr., Wagner 1237; I.D.F. 81).[3] Some WD's obviously sell to both domestic and foreign car part jobbers (Tr., Wildermuth 1396; I.D.F. 81).

B. *Borg-Warner*

Borg-Warner's Automotive Parts Division (APD) produced for sale in the aftermarket eighteen lines of parts, three of which were ignition parts, wire and cable products, and carburetor tune-up kits (Tr., Reichers 622–23; the uses of these parts are described in I.D.F. 99, 113, and 125). In response to demand from its customers, Borg-Warner began adding fast-moving foreign car parts to its various lines in 1972 or 1973 (Tr., Reichers 639; Weber 861; I.D.F. 85, 86). Borg-Warner sells in the aftermarket to traditional warehouse distributors (Tr., Reich-

[3] I.D.F. 79, which implies that all jobbers specialize in either domestic or import car parts, must be read in conjunction with I.D.F. 80–81, which clarify that many jobbers carry both types of parts.

ers 625; I.D.F. 87). Borg-Warner's total sales of automotive parts in the aftermarket were approximately $69.1 million in 1978 (Tr., Reichers 621; BWX 34A, *in camera;* I.D.F. 84). Its sales of [5] ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars were approximately $900,000 in 1978.[4]

C. *Bosch U.S.*

Bosch U.S.'s Automotive Sales to Manufacturers (ASM) division is engaged in sales of foreign car parts to manufacturers in the aftermarket, and its Automotive Sales to Independent Distributors (ASD) division is engaged in such sales to warehouse distributors in the aftermarket (Tr., Bendixen 894–95; I.D.F. 89). Bosch U.S. sells full lines of foreign ignition parts; the fast-moving parts constitute the majority of sales in this line (Tr., Weber 861–62; Wagner 1274–75; I.D.F. 109). Bosch U.S. sells two items in the wire and cable line for a wide range of foreign cars (Tr., Bendixen 898–99; I.D.F. 139);[5] and a line of carburetor tune-up kits for imported cars that is virtually identical to that of Borg-Warner—Borg-Warner manufactures all of Bosch U.S.'s carburetor kits (Tr., Weber 867; Wagner 1273; Bendixen 930; I.D.F. 122, 124). Bosch U.S. sells its lines of parts both to domestic and to import specialist WD's; thirty percent of its sales and seventy percent of its customers are domestic WD's (Tr., Bendixen 913–14; Wagner 1213, 1266–67; I.D.F. 90, 96, 98). Bosch U.S.'s sales in the aftermarket totalled $72 million in 1978; its sales to WD's in 1978 totalled $36 million. Approximately fifteen percent of its sales (*i.e.* $5.4 million of [6] sales to WD's) were in ignition parts, wire and cable products, and carburetor tune-up kits (Tr., Bendixen 913–17; I.D.F. 90, 91).[6]

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[4] Respondents have accepted this figure for purposes of their appeal (RAB 42–43, *citing* I.D.F. 104, 116, 134). Complaint counsel object to this figure, but their proposed figure includes some parts that are not part of the relevant product lines (*see* CAAB 21–22; RARB 23–24). Respondents did, however, in responding to interrogatories of complaint counsel, list sales of various ignition parts with application on imported vehicles totalling $1.116 million (*see* CAB 18, *citing* Confidential App. to Borg-Warner Int. No. 2, *in camera;* CPF 70). This would place Borg-Warner's total sales of the relevant parts at $1.4 million. We note that the interrogatory response seems to contain parts that may not have application on foreign vehicles (*e.g.* part no. E 1, *see* CX 4Z–206), but also that it is missing some parts with such application (*e.g.* part nos. A 534, A 535, C 561, C 576, D 575, E 38; *see* CX 5D; CX 5E; CX 5J; CX 5"O"; CX 5Q; CX 5T; CX 5W). Rather than searching for an exact figure that neither respondents nor complaint counsel saw fit to provide, however, we accept the ALJ's determination that Borg-Warner made $900,000 in sales of parts with application on imported cars in the ignition, wire and cable, and carburetor kit lines in 1978.

[5] The last sentence of I.D.F. 139 is inaccurate. The first sentence of this finding, which states that Bosch U.S. sells spark plug connectors as well as ignition cable sets, is correct.

[6] The testimony of Bosch U.S. as to its sales is somewhat sketchy. In response to complaint counsel's interrogatory no. 33, Bosch listed its total sales of wire and cable products for 1978 as $858,027; its total sales of carburetor tune-up kits at $151,197; and its total sales of ignition parts (that is, points, condensers, caps, rotors, ignition coils, switches, and regulators—the items Borg-Warner sells in its ignition parts line) at $11,368,917.

Complaint counsel's estimate of total sales must be rejected. Citing to I.D.F. 110, complaint counsel contend that Bosch U.S.'s sales of ignition parts alone totalled $30.3 million, more than the 15% of total aftermarket sales that Bosch claimed it made in all three lines (CAB 18; CAAB 21). As respondents correctly point out, however, complaint counsel have included alternators, generators, and starters in the ignition parts line (RARB 14 n.7). The ALJ properly found these items were not ignition parts (*see* I.D.F. 99).

D. *Bosch GmbH*

Bosch GmbH is the owner, both directly and indirectly through two subsidiary holding companies, of all of the capital stock of Bosch U.S. (Complaint and Bosch U.S. Ans. ¶4; Tr., Fiene 1323, 1329; I.D.F. 13, 35). Bosch GmbH elected all of the directors of 1329; I.D.F. 13, 35). Bosch GmbH elected all of the directors of Bosch U.S., and four of Bosch GmbH's directors also served on the board of Bosch U.S. during 1978 (Bosch GmbH Int. No. 9; Tr., Fiene 1325–26; I.D.F. 36–37). Bosch GmbH does not make sales to WD's in the United States, but it sells a substantial number of parts to Bosch U.S., the only company located in the U.S. to which Bosch GmbH makes sales (CX 88, at 29, 33–34; I.D.F. 59, 107). The ALJ entered numerous findings on the special relationship between Bosch GmbH and Bosch U.S. (I.D.F. 33–61; I.D. 52–56), which we will discuss below.

E. *The Individual Respondents*

Dr. Hans L. Merkle has been a member of the board of management of Bosch GmbH since 1958 and was its chairman in 1978. He had been a member of the board of directors of Bosch U.S. since 1967, and he joined the board of Borg-Warner on or about April 26, 1977 (Complaint & Merkle Ans. ¶6, Bosch GmbH Int. No. 10; CX 59L; CX 67A-B; I.D.F. 18–21).[7] [7]

Dr. Hans Bacher was a member of the board of Bosch GmbH since 1967, was a member of the board of Bosch U.S. during all times relevant to this proceeding, and became a director of Borg-Warner at the same time as did Dr. Merkle (Complaint & Bacher Ans. ¶7; Bosch GmbH Int. No. 10; CX 59M; CX 67A–B; I.D.F. 23–26).

After the trial in this proceeding, respondents notified the Administrative Law Judge that Messrs. Bacher and Merkle were no longer members of the Bosch U.S. board, and that certain changes in the Bosch parent-subsidiary structure had taken place.[8] On January 24, 1983, counsel for Hans Bacher notified the Commission of Dr. Bacher's death.

F. *Issues on Appeal*

Section 8 of the Clayton Act provides, in pertinent part:

> [N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 . . . , if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition

[7] Dr. Merkle was elected to Borg-Warner's board when Bosch GmbH acquired a 9.5% interest in Borg-Warner's stock for approximately $63 million (I.D.F. 27, 29).

[8] *See* Letter from Joseph A. McManus, Esq., *supra* note 1.

by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

15 U.S.C. 19.

The statute, on its face, contains four elements. First, a person must be simultaneously the director of at least two corporations. Second, at least one of the corporations must have capital, surplus, and undivided profits aggregating more than one million dollars. Third, the corporations must be engaged in whole or in part in commerce. Fourth, the corporations must be competitors. The first three of these elements are not in dispute.[9] The fourth is very much at issue.

Respondents raise several issues on appeal. First, they argue that Borg-Warner and Bosch U.S. do not compete and that the ALJ used an incorrect standard for determining "competition" under Section 8. Respondents also contend that Bosch GmbH does not exercise actual and direct control over the activities of [8] Bosch U.S. and cannot be held in violation of Section 8. Even if there was competition, respondents submit that it was *de minimis* and thereby not cognizable under Section 8. Further, respondents claim that a charge under FTC Act Section 5 cannot cure these defects in complaint counsel's Clayton Act Section 8 case. Finally, respondents argue that even if an order were appropriate, it should be narrow because the violation found was a "technical" one and because there is ample FTC precedent for a limited prospective order.

Respondents have also raised procedural issues in post-trial motions. They have alleged the prospect of *ex parte* communications between the Commission and its staff in this matter and another case, and they have moved the dismissal of this case, or its continued delay, on the grounds that the public interest weighs against a finding of liability with respect to the parent-subsidiary competition and *de minimis* competition issues.

Complaint counsel raise two issues on appeal. They claim that the ALJ was mistaken in finding that Borg-Warner and Bosch GmbH were not competitors as to automotive air conditioning compressors,[10] and that the ALJ's order was unduly narrow and should have extended to any interlocked "officer, agent or employee" of Borg-Warner.

II. COMPETITION BETWEEN BORG-WARNER AND BOSCH U.S.

Respondents assert that Borg-Warner and Bosch U.S. were not competitors for purposes of Section 8, claiming that these corpora-

[9] There was considerable skirmishing at trial over whether Bosch GmbH was "in commerce" in the United States (*see* I.D.F. 10; I.D. 53–54), but this issue was not raised on appeal.

[10] Complaint counsel have not appealed the ALJ's determination that Borg-Warner did not compete with Bosch U.S. or Bosch GmbH for sales of hydraulic products (CAB 4 n.1). Complaint counsel determined before trial to offer no evidence concerning the other products listed in the complaint, namely, automotive test equipment and carburetors (I.D. 2 n.1).

tions sold lines of parts to their warehouse distributors that were not substitutable, and that the parts were distributed in a manner that precluded competition.

The legal standard for competition under Section 8 has been examined in very few cases. The statute itself bars interlocking directorates among two or more corporations "if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 15 U.S.C. 19. The purpose of the statute was "to nip in the bud incipient antitrust violations by removing the [9] opportunity or temptation for such violations through interlocking directorates." *TRW, Inc. v. FTC,* 647 F.2d 942, 946–47 (9th Cir. 1981); *United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

The role of competition analysis in Section 8 is not to measure market power or to assess competitive effects; it is to establish a nexus of competitive interests between corporations sufficient to warrant concern over collusion or other outright market division should interlocked directors seek to share or exchange information. Proof of competition under this statute does not depend, therefore, on the kind of complex product market definition that may be required in a merger or monopolization case. *TRW, Inc.,* 93 F.T.C. 325, 380 (1979), *aff'd in part and rev'd in part,* 647 F.2d 942 (9th Cir. 1981). Interlocked directors of competing corporations have the incentive and ability, through access to confidential business information, to advise or direct that the competitive decisions of two or more corporations be made so as to minimize adverse effects on any or all of the competitors. As the House of Representatives report that supported passage of the Section stated:

> The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts. . . .

H.R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, at 20 (1914). Judge (now Justice) John Paul Stevens has summarized the legislative purpose that militates against endless economic analysis of "competition" under Section 8:

> We do not believe Congress intended the legality of an interlock to depend on the kind of complex evidence that may be required in a protracted case arising under §7. On the contrary, the statute reflects a public interest in preventing directors from serving in positions which involve either a potential conflict of interest or a potential frustration of competition. *Protectoseal Co. v. Barancik,* 484 F.2d at 589.

This is not to say that some sophistication in economic analysis cannot facilitate understanding of the competitive nexus. We have found it appropriate to draw by analogy on concepts applied under Section 2 of the Sherman Act and Section 7 of the Clayton Act (15 U.S.C. 2, 18) in determining competition under Section 8. *TRW, Inc.*, 93 F.T.C. at 380. In particular, the courts and the Commission in deciding Section 8 cases have drawn on the market definition analysis established in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962), in order to "recognize competition where, in fact, competition exists." *TRW, Inc.*, 93 F.T.C. at 380, *citing United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964). For example, in *TRW* the two [10] corporations were found to be competitors as to point-of-sale credit authorization and electronic funds transfer products, even though the products of each corporation functioned so differently from those of the other company that in almost all cases the products of only one of the corporations could meet a customer's requirements. As the court stated the problem, "[T]he products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each." *TRW, Inc. v. FTC,* 647 F.2d at 946, 948. The Commission and the reviewing court found, however, that several of the seven indicia of a market set out in *Brown Shoe Co. v. United States,* 370 U.S. at 325, were met: the corporations were vying for the business of the same purchasers, were attempting to convince the same purchasers that their products best suited the purchasers' specific needs, were offering to modify existing equipment to meet purchaser needs, were being recognized as competitors by the industry and customers, were using similar production techniques, and were not serving distinct groups of customers. 647 F.2d at 946–47. A competitive nexus sufficient to find the two corporations "competitors" for purposes of Section 8 was therefore established, even though the corporations' products were "purchased by different types of users and functioned in different ways." 93 F.T.C. at 381.

This case is less difficult than others decided under Section 8, including *TRW.* There is ample evidence that many of the "fast-moving" foreign car parts sold by Bosch U.S. and Borg-Warner are substitutable and have no significant physical differences. The product catalogs, which were a great part of the decisive evidence in this proceeding (CX 3A–Z36; CX 4A–Z248; CX 5A–Z6; CX 15A–Z79; CX 16A–Z42; CX 17A–Z284), fully support the ALJ's findings that the two corporations' foreign-car ignition parts, wire and cable products, and carburetor kits were functionally equivalent.[11] These catalogs

[11] I.D.F. 69 is modified to reflect the fact that coverage of the parts lines of different manufacturers can be compared by examining not only the manufacturers' parts interchange lists but the entire catalog of each manufacturer.

show Borg-Warner and Bosch parts under the same headings for the same uses. As to ignition parts, Borg-Warner and Bosch U.S. catalogs in the record contain several such parts that are substitutable on a number of [11] imported cars.[12] Indeed, Borg-Warner's coverage in the fast-moving ignition parts—that is, points, condensers, distributor caps, and rotors for the most popular imported cars (Volkswagens, Toyotas, and Datsuns)—was comparable to that of Bosch U.S. and the corporations Bosch agreed were its competitors (Tr., Bendixen 922; I.D.F. 112). As to wire and cable products, Borg-Warner has an application for almost all the fast-moving foreign car part applications covered by Bosch U.S. (Tr., Nelson 513–14; CX 15; CX 17J–Z135, Z–247; I.D.F. 143). As to carburetor tune-up kits, respondents' own witness testified that Bosch U.S.'s coverage and Borg-Warner's coverage was comparable or "close to being the same, since Borg-Warner manufactures them for [Bosch U.S.]" (Tr., Wagner 1273, Bendixen 930; I.D.F. 117, 124). We adopt these findings of the ALJ, and we find that this evidence is conclusive indication of product substitutability.

We also believe that the record shows an industry perception of competition between Borg-Warner and Bosch U.S. as to foreign car parts, and an attempt on the part of these corporations to convince the same purchasers that their products suited the purchasers' needs. *See TRW, Inc. v. FTC,* 647 F.2d at 946, *quoting* 93 F.T.C. at 381–82. Seventy percent of Bosch U.S.'s customers are traditional WD's, once the exclusive customers of such domestic part producers as Borg-Warner. Thirty percent of Bosch U.S.'s sales in 1978 were to traditional WD's (Tr., Bendixen 912–15; I.D.F. 90, 97, 98). Borg-Warner, both in its catalogs (used for promotion and for customer reference) and in its advertising has promoted itself not only as a domestic part producer but also as an import car part producer (*e.g.* CX 4; CX 15; BWX 23G; BWX 25A; CX 70A-C). Bosch U.S. has advertised and thus held out for sale its parts in publications directed at both import specialist and traditional WD's and jobbers, and some consumers (RBUSX 12; Tr., Bendixen 931–33; I.D.F. 95). Both Borg-Warner and Bosch U.S. are members of the Automotive Warehouse Distributors Association, of which import specialist WD's are not members. The meetings of this trade association are a way for manufacturers to obtain new customers among traditional warehouse distributors (Tr., Wagner 1258–59; CX 85; I.D.F. 73). The conclusion is inescapable, even if only the manufacturer-to-WD market for these products is examined, that

[12] I.D.F. 111 describes some examples of parts which, as complaint counsel correctly point out, are illustrative of the parts produced by Borg-Warner and Bosch that are interchangeable. *See, e.g.,* CX 4Z–191, CX 17Z–121 (Borg-Warner ("B-W") part no. A 515 substitutable for Bosch U.S. ("BUS") part no. 1–237–013–026); CX 4Z–210, CX 17Z–38 (B-W part no. G 582 substitutable for BUS part no. 1–237–330–067); CX 4Z–196, CX 17Z–113 to 114 (B-W part no. C 541 substitutable for BUS part no. 1–235–522–027); CX 4Z–202, CX 15Z–89 to 91 (B-W part no. D 555 substitutable for BUS part no. 1–234–332–074).

Borg-Warner and Bosch U.S. have the same potential customers and that their [12] promotion activities have held out these corporations and their wares as including foreign car parts business.[13]

Respondents urge vigorously that there can be no competition between these two corporations because there are "distinct" channels of distribution and because the entire lines of ignition parts, wire and cable products, and carburetor kits of each corporation are not substitutable. First, we reject the assertion that there are clearly distinct channels of distribution. Borg-Warner and Bosch U.S. sell lines of parts to the so-called traditional WD's (Tr., Reichers 625; Wagner 1213, 1266; I.D.F. 87, 96). Both traditional and import part jobbers buy lines of parts from traditional and import specialist WD's (Tr., Wagner 1234, 1237; Wildermuth 1396–97; Weber 846–47; I.D.F. 78–81). Jobbers generally sell the parts to retail outlets such as repair shops and service stations where parts are sold individually, but some jobbers also make such retail sales (Tr., Weber 802–03; I.D.F. 62). Unlike the cases in which lines of distribution precluded competition,[14] various segments of both companies' lines of parts compete at every level of the distribution chain in this case.

The full-line/part-line distinction is also irrelevant for purposes of analysis under Section 8. Respondents urge, in essence, that we inquire into the total universe of companies and products in determining a relevant product market; respondents claim in particular that this market is larger than "fast-moving [13] foreign cars parts." A determination of competition under Section 8 does not depend on analysis as extensive as that required under Section 7. Detailed inquiry into the total universe of products and companies in defining a relevant market is crucial in Section 7 cases in order to assess market concentration and to measure the increase of market power under an aggregation of market shares. The probability of competitive effect is projected on the basis of this measurement. Under Section 8, however, the critical inquiry is to identify a competitive nexus between corporations sufficient to warrant concern over potential antitrust violations involving coordination of competition between the firms—in other

[13] Respondents did offer several industry witnesses that testified that they did not view Bosch U.S. and Borg-Warner as competitors. Some testified on the short-line, full-line differences (Tr., Weber 783, 830; Bendixen 918; Wildermuth 1407). Some testified that they knew of no "changeovers" or exercise of choices between the lines at the WD level (Tr., Johnson 981–82). These subsidiary arguments we will deal with below; in part, respondents expect too much of competition analysis under Section 8. The comments of two of these witnesses, however, are particularly telling. Mr. Rodger Wagner, National Sales Manager for Bosch U.S., after stating that he had never regarded Borg-Warner as a competitor, admitted that Borg-Warner was a competitor, at least in a limited way: "The amount of their business in my areas of responsibility from time to time, from [19]71 until now, Borg-Warner has never been a significant factor in the marketplace in imported car parts" (Tr., 1251). Further, an import specialist WD, Mr. Karl Heinz Flicker, admitted on cross-examination that he had previously stated to complaint counsel that Borg-Warner had a line of carburetor kits competitive with that of Bosch U.S. (Tr., 1193). It is with these three lines of parts, this "factor in the marketplace," that this case deals.

[14] *See, e.g., L.G. Balfour Co. v. FTC*, 442 F.2d 1, 11 (7th Cir. 1971) (college fraternity insignia jewelry not in same market with all emblematic jewelry).

words, to determine whether the products are sufficiently substitutable to raise a concern of price-fixing or other collusion. The statute simplifies this inquiry by requiring only that the firms allegedly interlocked are in fact competitors in regard to some product or service. We have described above the evidence of product substitutability, industry perception of competition, and lack of distinct customers, that in our view establishes such a competitive nexus. Moreover, the clear distinctions respondents seek to establish in this case between full lines and short lines become blurred upon close examination. Jobbers and WD's do not carry every part in a "full line" (Tr., Wildermuth 1409; I.D.F. 76); the fast-moving parts are by definition the majority of the parts stocked and sold from either type of line (*id.*); two firms need not manufacture or sell identical products or an identical range, selection, or number of products in order to compete;[15] **[14]** and the manufacturers themselves regard the ultimate consumers (who buy individual parts) as part of their markets.[16]

It is true that Borg-Warner not only deals primarily in domestic automotive parts, but distributes those parts through a chain of warehouse distributors and jobbers that have traditionally dealt only in parts for domestic automobiles. Bosch has dealt with a different body of distributors, those that are specialists in the distribution of foreign automotive parts. The "competitive realities" of this case, however—and of this industry generally—are that the growth of the market position of automobiles of foreign manufacture have led Borg-Warner into the decision to enter into the sale of a limited line of automotive parts that are most in demand for the purpose of repairs to popular foreign car makes, a field heretofore left to Bosch and other imported car parts firms. The record—simply put—is that Borg-Warner customers in the early 1970's were coming more and more to receive requests for parts from repair facilities for the best-known makes of foreign cars, and that Borg-Warner responded to that demand by the initiation of a **[15]** program of foreign car parts distribution.[17] As the

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[15] *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *TRW, Inc. v. FTC*, 647 F.2d 942 (9th Cir. 1981); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 552 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Harnischfeger Corp. v. Paccar, Inc.*, 474 F.Supp. 1151, 1154–57 (E.D. Wisc.), *aff'd*, 624 F.2d 1103 (7th Cir. 1979).

[16] Norman Reichers (former vice-president of sales for Borg-Warner's Automotive Parts Division), in discussing "targeted accounts"—WD's that Borg-Warner wanted as customers—testified concisely as to the overlap of the markets:

> A targeted account is an account that we have selected in a specific marketing area that possesses the service power which would be inventories, sales organization, good jobber distribution, so forth, *to help us or enable us to get a larger percent of the potential market in that area*

(Tr. 663 (emphasis added)).

[17] *See* Tr., Reichers 639–40:

> Q. Can you tell me how it came about that Borg-Warner carries—Borg-Warner auto parts division offers parts for import car applications?
>
> A. The trend started in the early '70s. And somewhere along about '72 or '73 due to popular demand from our warehouse distributors, we started adding some applications for the extremely fast-moving popular import cars.

(footnote cont'd)

catalogs that form the body of evidence in this proceeding make clear, the Borg-Warner parts in question are complete substitutes for Bosch parts for identical uses on the same cars. The Administrative Law Judge, dealing with the argument of respondents that complaint counsel had failed to show that any distributor had switched its line of parts from one of these companies to the other, concluded nonetheless that purchasers of these parts had a "choice" between the two.[18] We think the analysis is more direct: Borg-Warner elected to enter into a limited but growing line of commerce, which was once the preserve of Bosch and other rivals in the business of supplying replacement parts for foreign cars. There is no gainsaying the simple conclusion that Borg-**[16]**Warner made a business decision to take advantage of growing consumer demand for fast-moving repair parts for the most popular foreign cars, and that the sales it made in this regard would otherwise have gone to Bosch or to other corporate rivals. This is competition.

The Commission holds that Borg-Warner was a competitor of Bosch U.S. in sales of ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars, and that the presence of Messrs. Bacher and Merkle on the boards of both corporations was thus a violation of Section 8.

III. COMPETITION BETWEEN BORG-WARNER AND BOSCH GmbH

Respondents urge that the ALJ was mistaken in finding a violation on the part of Bosch GmbH. Although Messrs. Bacher and Merkle were directors of both Bosch GmbH and Borg-Warner during the relevant time period, respondents claim that Bosch GmbH cannot be deemed to have been a competitor of Borg-Warner by virtue of the parent-subsidiary relationship between Bosch GmbH and Bosch U.S. Indeed, there is no evidence that Bosch GmbH and Bosch U.S. do not maintain corporate formalities, or that Bosch U.S. is undercapitalized. Bosch GmbH itself does not make sales of automotive parts directly to WD's in the United States; Bosch GmbH's only sales of such parts in the U.S. are to Bosch U.S.

Q. To your knowledge were there other domestic parts suppliers who also added some foreign applications to their line about that time?

* * * * * * *

[A.] Yes. Yes, and that is why we got involved in it, because of popular demand.

[18] The language of "choice" was recently adopted by the Ninth Circuit in *TRW, Inc. v. FTC:*

> Thus, in the eyes of the Commission, "competitors" are companies that vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from *having a choice* of a suitable product from each.
>
> * * * * * * *
>
> The Commission, we conclude, employed the proper legal standard for determining competition.

647 F.2d at 946, 947 (emphasis added). Unlike *TRW,* in which competition was found even though the products were "purchased by different types of users and functioned in different ways," 93 F.T.C. at 381, the instant case involves interchangeable products that were purchased by the same types of users for the same functional purposes in foreign cars.

The generally accepted principles for imputing a subsidiary's activities to its parent corporation under Section 8 are elementary and few. A parent corporation is not a competitor of another corporation merely because its subsidiary is. *United States v. Crocker National Corp.*, 656 F.2d 428, 450 & n.77 (9th Cir. 1981) (citing *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978)), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685 (U.S. June 8, 1983). *But see Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.,* 1966 Trade Cas. (CCH) ¶71,678, at 82,065 (S.D.N.Y.) (subsidiaries, parents should not be considered in determining Section 8 competition). Conversely,

> to interpret Section 8 as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a "competitor" within the meaning of Section 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless, and would ignore the Supreme Court's admonition that the antitrust laws are "aimed at substance rather than form."

United States v. Crocker National Corp., 656 F.2d at 450, *citing United States v. Yellow Cab Co.,* 332 U.S. 218, 227 (1947). [17]

In determining whether a parent corporation should be thus liable under Section 8, courts often have focused on the degree of "control" exercised by the parent over the subsidiary. For example, in *Crocker National Corp.,* the court of appeals held that "[i]f the parent substantially controls the policies of its subsidiary, it may fairly be said, in the language of the competing corporation provision of Section 8, that the 'business and location' of the parent include the business and location of the subsidiary." 656 F.2d at 450; *see also United States v. Cleveland Trust Co.,* 392 F.Supp. 699, 712 (N.D. Ohio 1974) *aff'd mem.,* 513 F.2d 633 (6th Cir. 1975); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266, 1268 n.11 (1950).

In any area of law, the criteria for deciding when a subsidiary's activities should be imputed to its parent corporation are based on the purpose of the law in question. As Judge Henry Friendly noted several years ago in a case interpreting the Norris-LaGuardia Act:[19]

> Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo,*" Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 604 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. . . . The policy behind the Norris-LaGuardia Act was a strong one; we

[19] In pertinent part, the Norris-LaGuardia Act forbade a court to issue an injunction against picketing "in any case involving or growing out of any labor dispute," which was defined in the statute as involving persons "who are engaged in the same industry, trade, craft, or occupation." *See* 303 F.2d at 372. The court was faced with the question whether a shipping company was in the same "industry, craft, or occupation" as a sister corporation in the wood-cutting business, which was the subject of a strike.

cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.

Bowater Steamship Co. v. Patterson, 303 F.2d 369, 372–73 (2d Cir.), *cert. denied,* 371 U.S. 860 (1962). In other words, the degree of deference accorded to the corporate entity depends on the legal rule at issue, and courts should give emphasis in their analysis to fulfilling the intent of the underlying statute. Thus, parent corporations are held liable for the subsidiary's tort or breach of contract on the "control" or "piercing the corporate veil" theory, which respects the limited liability of [18] the subsidiary's stockholder unless the parent corporation becomes so involved in the subsidiary's activities that regarding them as separate is an unacceptable fiction. *See generally Steven v. Roscoe Turner Aeronautical Corp.,* 324 F.2d 157 (7th Cir. 1963); *American Trading & Production Corp. v. Fischbach & Moore, Inc.,* 311 F.Supp. 412 (N.D. Ill. 1970). It is this type of common-law inquiry, which places heavy emphasis on corporate formalities and the degree of day-to-day interference in a subsidiary's management, that respondents urge as appropriate in Section 8 analysis. Strict adherence to this common law rule is not required under Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act (15 U.S.C. 18, 45), however, because the public interest in antitrust and consumer protection enforcement would be frustrated in many cases if separate corporate entities were respected universally. *See P.F. Collier & Son Corp. v. FTC,* 427 F.2d 261 (6th Cir.) (Section 5), *cert. denied,* 400 U.S. 926 (1970); *Jim Walter Corp.,* 90 F.T.C. 671, 734–35 (1977) (Section 7), *rem'd on other grounds,* 625 F.2d 676 (5th Cir. 1980); *Beneficial Corp.,* 86 F.T.C. 119, 159 (1975) (Section 5), *modified,* 542 F.2d 611 (3d Cir. 1976). *But cf. National Lead Co. v. FTC,* 227 F.2d 825, 828–29 (7th Cir. 1955) (applying "substantial identity" rule to clearly separate corporations charged with violations of Section 2(a) of Clayton Act and Section 5), *rev'd on other grounds,* 352 U.S. 419 (1957).

The policies behind Section 8 also do not merit strict adherence to the common law test of "control." The relevant inquiry under Section 8 is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests. The common-law "control" inquiry is relevant insofar as it is an indication of the likelihood of collusion and anticompetitive transfer of information among competitors. If a parent company has directors in common with its subsidiary's competitor, but if the parent exercises

little or no control over its subsidiary, there may be little opportunity for anticompetitive behavior. As the facts of this case show, however, there are factors other than those critical to a common-law inquiry that warrant a finding that Bosch GmbH is a competitor of Borg-Warner.

The Administrative Law Judge applied the "control" test, and entered detailed findings concerning the business relationship of Bosch GmbH and Bosch U.S. (I.D.F. 33–61, summarized at I.D. 54–56). The Commission adopts these findings and we need only highlight them here. Bosch GmbH wholly owns Bosch U.S., both directly and through holding companies in which Bosch GmbH is the majority shareholder (Tr., Feine 1329; I.D.F. 35). The president and chief executive officer of Bosch U.S. testified that he reports directly to Bosch U.S.'s board of directors, which in turn represents shareholder interests—with Bosch GmbH being the majority shareholder (CX 88, at 15; *see* Tr., Feine 1346– [19] 48). Bosch GmbH and its subsidiaries nominate and elect the directors of Bosch U.S. (Bosch GmbH Int. No. 9; I.D.F. 36). Bosch GmbH created Bosch U.S. in 1953 for the purpose of marketing products in the United States under the Bosch trademark (CX 88, at 25; I.D.F. 34). Bosch U.S. is the sole United States company licensed to use the Bosch trademark, for which Bosch U.S. pays trademark royalties to Bosch GmbH (Bosch GmbH RA 29; Int. No. 31(j); I.D.F. 55).

Bosch U.S. submits reports concerning its forecasts, operating results, balance sheets, and business plans to Bosch GmbH (Tr., Feine 1330; Bosch GmbH Int. No. 31, at 48; I.D.F. 46). The companies evaluate the products Bosch U.S. needs for the markets it attempts to service (Tr., Feine 1331; I.D.F. 48). To facilitate this goal, Bosch U.S. is privy to Bosch GmbH's research and development programs and has access to Bosch GmbH's engineering center (Tr., Feine 1331). Bosch GmbH suggests products that Bosch U.S. might introduce into the U.S. market, although on occasion Bosch U.S. has told Bosch GmbH that it cannot do so profitably for reasons of human and financial resources or U.S. statutory requirements (*id.;* I.D.F. 48). Although Bosch U.S. maintains a line of credit with domestic banks and has assets in excess of $100 million, it relies on contributions from Bosch GmbH for capital investment (Tr., Feine 1334–35; Bosch GmbH & Bosch U.S. RA 54–55; I.D.F. 53–54).[20] The two companies also evaluate how Bosch U.S. can best "identify [itself] as an American company doing business in America" (Tr., Feine 1331).

There is further evidence in this case that is more dispositive of parent corporation liability for purposes of Section 8 than it would be in a common-law determination. First, officers of Bosch GmbH and

[20] I.D.F. 53 should reflect the fact that Bosch GmbH has made continuing, rather than one-time, capital contributions to the business of Bosch U.S.

Borg-Warner had discussions about the business of Bosch U.S. which involved potential "cooperation" [20] relating to Bosch U.S.'s activities.[21] This evidence indicates to us that the "temptations" to anticompetitive behavior that the statute was established to abate were very nigh at hand. *See TRW, Inc. v. FTC,* 647 F.2d at 947. Second, four of Bosch GmbH's directors sat on Bosch U.S.'s board (Tr., Fiene 1325–26; I.D.F. 37), and two of these same directors—Dr. Bacher and Dr. Merkle—also sat on Borg-Warner's board (Complaint & Merkle Ans. ¶6; Complaint & Bacher Ans. ¶7; Bosch GmbH Int. No. 10; CX 59L; CX 67A-B; I.D.F. 17–26). Professors Areeda and Turner suggest that the legality of interlocks between a parent corporation and its subsidiary's competitor should be determined by asking "whether the subsidiary's business could ordinarily be expected to be the subject of the parent's boardroom deliberations." 5 P. Areeda & D. Turner, Antitrust Law ¶1302(b), at 367 (1980). In the instant case, this additional indication of "control" is met: Four members of the parent corporation's board had full knowledge of and input to the subsidiary's board deliberations, and two of the four also had similar knowledge of and input to the board actions of the subsidiary's competitor. [21]

Respondents impute great importance to the ALJ's finding that Bosch GmbH does not control the day-to-day activities of Bosch U.S. (I.D.F. 61). They also assert that the record in this case fails to establish systematic instructions from parent to subsidiary. We do not find such considerations dispositive in a Section 8 inquiry into whether a parent corporation is a "competitor" of its subsidiary's competitors. We would render the statute meaningless if we were to disregard the evidence of actual, or at least substantial control of Bosch GmbH over Bosch U.S., the evidence of discussions of "cooperation" between Bosch GmbH and Borg-Warner, and the presence of four of the Bosch GmbH directors on the Bosch U.S. board and the presence of two of these same directors on the board of Borg-Warner. We cannot accept the view that merely observing corporate formalities insulates a par-

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[21] Borg-Warner Vice President of Engineering William H. Weltyk made the following report on his visit to Bosch GmbH in Stuttgart, Germany, on February 3–6, 1976:

> *We then met with Mr. Hertz who is in charge of the aftermarket outside of Europe. We talked in particular about Bosch's aftermarket activities in the United States which is headquartered in Chicago.* Their aftermarket group employs about 800 people and they have offices in New York, San Francisco and Houston. They have direct sales of 4 classes of trade: to warehouse distributors, to foreign vehicle distributors, to mass merchandisers and to outlets which specialize in diesel engines. In total, Bosch has about 1,000 direct accounts. Their primary products are spark plugs, starters, alternators (which are mainly rebuilt), *ignition parts* and electronic fuel injection equipment. *All in all, the Bosch organization seems to have a very adequate aftermarket group in the United States.* Mr. Hertz was not available for a very long time and therefore *we did not have ample opportunity to probe what opportunities for cooperation might exist in this area.* Also we were not able to cover distribution in South America or Mexico as a result of this tight schedule. *These topics will be reviewed further in future meetings.*

(CX 29I; I.D.F. 57 (emphasis added)).

ent corporation in situations such as this. The evidence as a whole fully justifies finding Bosch GmbH to be a competitor of Borg-Warner for purposes of Section 8.[22]

Respondents argue that Section 8 deals with "direct" and not "indirect" interlocks. *See* RAIB 9, *citing* Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 26 (Comm. Print 1965); Federal Trade Commission, Report on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. 14–15 (1950). Indeed, the Administrative Law Judge characterized the Bosch GmbH-Borg Warner interlock as "indirect,"—an inappropriate term, in our view. None of the authorities cited by respondents and none that we have found include parent-subsidiary relationships among the lists of "indirect" interlocks. Situations such as that in the instant case are more accurately designated as direct interlocks between competing corporations, the fact that only the subsidiary was literally making competing sales having been disregarded on sound policy grounds. *See* 5 P. Areeda & D. Turner at ¶¶1302(b), 1304 (discusses parent-subsidiary interlocks as a problem separate from indirect interlocks); *United States v. Crocker National Corp.,* 656 F.2d at 451. **[22]**

Respondents also contend that if Congress had intended to prohibit such arrangements under Section 8, it would have done so specifically. Respondents cite several statutes, including Section 7 of the Clayton Act, in which Congress specifically included "indirect" or vicarious liability (*see* RAIB 6–7). We do not find this argument persuasive. The legislative history of Section 8 does not indicate precise limitations on which corporations can be deemed competitors by virtue of a closely related corporation's activities. Moreover, statutes that make no mention of liability of a parent or any other related corporation often are found to include such liability if strong public policy grounds warrant it. *See, e.g., Bowater Steamship Co. v. Patterson,* 303 F.2d 369 (2d Cir.), *cert. denied,* 371 U.S. 860 (1962).

Respondents urge that parent corporation liability under Section 8 would necessitate involved, case-by-case evaluations of the parent company's "control" of its subsidiary (RAB 44–47). We agree that this approach may not promote judicial economy as much as would a blanket rule barring liability in any parent corporation. At least one

[22] On the other hand, application of the same principles of analysis frustrates complaint counsel's appeal of one portion of the Initial Decision. The ALJ concluded, and we agree, that complaint counsel did not meet their burden of showing that Bosch GmbH exercised sufficient control over Femsa, Inc. to warrant imputing Femsa's production of automotive air conditioning compressors to Bosch GmbH. Although the record shows that Bosch GmbH owns more than 50% of Femsa, Inc.'s capital stock, directly or indirectly, we agree with the ALJ's determination that there is insufficient evidence of control or of corporate contacts to warrant a finding that Bosch GmbH and Borg-Warner competed in sales of air conditioning compressors through the remote corporate relationship with Femsa (*see* I.D. 52; I.D.F. 214–44). Complaint counsel's argument to the contrary in appeal of the Initial Decision is, therefore, rejected.

case has suggested, however, that barring parent corporation liability completely might encourage the establishment of technically remote corporate relationships in order to frustrate accountability for Section 8 liability. *See United States v. Crocker National Corp.*, 656 F.2d at 450. More importantly, such a blanket rule would elevate form over substances, and would do violence to the statutory purpose of preventing director interlocks that raise concerns of anticompetitive decision-making.

The Commission holds that Bosch GmbH was a competitor of Borg-Warner for purposes of Section 8. The presence of Messrs. Bacher and Merkle on the boards of both Borg-Warner and Bosch GmbH constituted an interlocking directorate among corporations that "are or shall have been theretofore, by virtue of their business and location of operation, competitors"—a violation of Section 8. [23]

IV. *DE MINIMIS* DEFENSE

Respondents claim that Section 8 contains a *de minimis* exception, and that even if there is competition between the corporate respondents, Borg-Warner's sales of the relevant products were too small for liability to attach.[23]

The statute itself contains no such exception. *TRW, Inc. v. FTC*, 647 F.2d at 948. Implicit in the statute's million-dollar net worth requirement and explicit in the legislative history of Section 8[24] is the judgment of Congress that the size of the interlocked corporations is the crucial *de minimis* inquiry. In [24] other words, it is the character of the restraint rather than the amount of commerce involved that Section 8 addresses. *United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 621.

Courts nevertheless have disagreed about whether Section 8 forbids

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[23] By framing the issue around Borg-Warner's sales of the relevant products and the small percentage of Borg-Warner's business that such sales constituted, respondents take a narrow view of what could constitute *de minimis* competition. Section 8 decisions often have examined the combined sales of the relevant products among *all* of the interlocked corporations. *See, e.g., United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 615, 621 (combined sales of $80 million do not come within *de minimis* principle); *Perpetual Fed. Sav. & Loan Assoc.*, 90 F.T.C. 608, 652 & n.10 (1977) (multimillion-dollar figures for loans in all respondent banks could "in no way be termed *de minimis* amounts"), *rem'd on other grounds*, No. 78–1134 (4th Cir. Nov. 10, 1978), *order withdrawn*, 94 F.T.C. 401 (1979). If combined sales were estimated in a *de minimis* rule, Bosch U.S.'s sales and those of Borg-Warner would amount to at least $6.3 million—clearly not *de minimis*. *See supra* notes 4, 6 and accompanying text; *infra* text accompanying note 29.

A *de minimis* rule also might examine the extent to which the interlocking companies occupy the markets of their competing products. *See United States v. Sears, Roebuck & Co.*, 111 F. Supp. at 620 (interlocked companies had sufficient market share to raise potential of either one gaining "total absorptive capacity" in certain communities by anticompetitive agreement). Such a rule, however, would require more complex evidence of the sort Congress did not intend to be required in Section 8 cases. *See Protectoseal Co. v. Barancik*, 484 F.2d at 589.

Although some consideration of these factors may properly be a part of guidelines for prosecutorial discretion in Section 8 cases, a detailed examination of size of industries, size of corporations, percentages of sales, or volumes of commerce is not properly a part of an adjudicative case under Section 8.

[24] *See* H.R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, at 19–20 (1914) ("great corporations" with more than $1 million net worth, not "smaller industrial corporations," subject to Section 8); S. Rep. No. 698, 63d Cong., 2d Sess. 15–16 (1914) (same); *see also* Pres. Woodrow Wilson's Message to Congress, Jan. 20, 1914, *reprinted in* H.R. Rep. No. 627, *supra*, pt. 1, at 17–18 (enumerating evils inherent in director interlocks among "great corporations").

interlocking directorates if only a *de minimis* amount of commerce is involved.[25] Two district court cases decided several years ago indicated that Section 8 included such a *de minimis* defense. *See Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.,* 1966 Trade Cas. (CCH) ¶71,678, at 82,065 (S.D.N.Y.) (*de minimis* competition not encompassed by Section 8); *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 621 (appreciable part of interstate commerce does "not come within the *de minimis* principle"). Recent cases, however, have found that Section 8 does not allow a *de minimis* defense. *See TRW, Inc. v. FTC,* 647 F.2d at 948 (*de minimis* exception not contemplated by Section 8); *United States v. Crocker National Corp.,* 422 F.Supp. 686, 703 (N.D. Cal. 1976), *rev'd on other grounds,* 656 F.2d 428 (9th Cir. 1981), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685 (U.S. June 8, 1983).

In *TRW, Inc. v. FTC,* the most recent case to examine the issue and the only court of appeals case to do so, the Ninth Circuit rejected a *de minimis* defense to Section 8. The court reasoned that Section 8 was designed to prevent restraints on competition before they materialized by outlawing interlocking directorates which facilitated such restraints. 647 F.2d at 948. The court determined that "Congress undoubtedly was as concerned with restraints that stop the growth of competition at a low level as it was with restraints affecting substantial segments of commerce." *Id.* The court found, therefore, that Congress intended to reach interlocks between competitors without regard to the amount of commerce that might be restrained. *Id.,* **[25]** *citing United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 619–21.

We find this reasoning persuasive. Implicit in the reasoning of the court of appeals was the philosophical underpinning of Section 8 that lies in the Sherman Act's proscription against collusion and other forms of trade restraint. Congress enacted Section 8 partly in response to the difficulties of proof under the "rule of reason" established for Sherman Act violations by the Supreme Court in *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911). Investigations of the "trusts" stimulated legislation that would reach specific practices at an early stage and arrest conspiratorial growth in its incipien-

[25] Commentators likewise have disagreed about whether Section 8 contains or should contain a *de minimis* exception. *See, e.g.,* Halverson, *Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?* 45 Antitrust L.J. 341, 342–43, 350–51 (1976) (although Section 8 is *per se* statute, Commission has discretion not to prosecute small Section 8 cases); Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266, 1268–69 (1950) (different interpretations possible but court decisions predicted to give little or no weight to amount of commerce involved); Travers, *Interlocks in Corporate Management and the Antitrust Laws,* 46 Tex. L. Rev. 819, 846 (1968) (policy considerations suggest that no explicit *de minimis* exception should be recognized); Wilson, *Unlocking the Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act,* 45 Antitrust L.J. 317, 324 (1976) (suggesting Section 8 includes *de minimis* concept); Note, *Interlocking Directorates and Section 8 of the Clayton Act,* 44 Alb. L. Rev. 139, 145 (1979) (competition must not be *de minimis,* citing *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*).

cy—before the actual vesting of anticompetitive effects. Interlocking directorates were one of the specific practices deemed so likely to facilitate collusion as to deserve outright condemnation even in the absence of express evidence of collusion itself. Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 2 (Comm. Print 1965). Therefore, unlike Section 7 of the Clayton Act, 15 U.S.C. 18, which proscribes certain stock acquisitions if "the effect . . . may be substantially to lessen competition," Section 8 is a *per se* statute that requires no showing of industry domination and no showing of present or potential anticompetitive effects. *See id.; TRW, Inc. v. FTC,* 647 F.2d at 948 (citing *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221–23 (1940)); *United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v. Sears, Roebuck & Co.,* 111 F.Supp. at 620–21. Such a *per se* statute logically excludes the sort of level-of-commerce analysis urged by respondents as well. Congress did not, of course, have before it in 1914 the sophisticated analysis of competitive relationships that has attended antitrust inquiries into conglomerates and multinational economic interests in more recent times. Congress nonetheless has declined thus far to alter the *per se* rule for finding a violation under Section 8. **[26]**

Respondents claim that the "so that" clause of Section 8[26] is, in effect, a *de minimis* limitation. Because there were no *per se* rules in 1914, so the argument runs, Congress could not have established such a rule in Section 8 (RAB 35–38). As we have noted, however, Congress enacted Section 8 specifically to obviate the necessity for a Sherman Act "rule of reason" approach. We agree with the ALJ and the courts that have examined this issue: the "so that" clause of Section 8 is satisfied if price-fixing arrangements among the competing corporations would be illegal, as they would be in this and virtually any other case without regard to the amount of commerce involved. *See TRW, Inc. v. FTC,* 647 F.2d at 948; *United States v. Crocker National Corp.,* 422 F.Supp. at 703; *United States v.* **[27]** *Sears, Roebuck & Co.,* 111 F.Supp. at 616–17, 620–21. We find unpersuasive respondents' arguments that the "so that" clause is a *de minimis* limitation on Section

[26] Section 8 prohibits interlocking directorates among two or more corporations in interstate commerce if any one corporation has a net worth of more than $1 million and

> if such corporations are . . . competitors, *so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.*

15 U.S.C. 19 (emphasis added). The leading case interpreting the "so that" clause is *United States v. Sears, Roebuck & Co.,* in which the court held that if price-fixing arrangements or territorial divisions among the competitors would violate the antitrust laws—and they would, because such agreements are *per se* violations—the "so that" clause of Section 8 would be satisfied. 111 F.Supp. at 616–17, 620–21. *See also* 5 P. Areeda & D. Turner, Antitrust Law ¶ 1302(a), at 364 (1980).

8.[27]

It should be noted that respondents' sales volume in the relevant products is not insubstantial. Even with a view of the evidence most favorable to respondents,[28] Bosch U.S.'s sales of the relevant products to WD's totalled approximately $5.4 million, and Borg-Warner's sales totalled approximately $900,000. In *TRW, Inc.,* the Commission found that $1 million and $7 million in sales of the relevant products by the respective corporations were not *de minimis* under Section 8, assuming arguendo that a *de minimis* defense applied. 93 F.T.C. at 385–86. In *Protectoseal Co. v. Barancik,* Judge Stevens found a violation of Section 8 where one of the corporations did $1.5 million of business in the relevant products and the other corporation met the $1 million net-worth requirement. 484 F.2d at 587 & n.3. The relevant amount of commerce engaged in by respondents in the instant case is comparable to that involved in *TRW, Inc.* and *Protectoseal,* and as such would not in any event meet a *de minimis* standard. These decisions bear out the analytic principle that it is not the volume of commerce that is the proscriptive concern of Section 8, but rather the character of the potential overt antitrust violation.

Finally, respondents raise several policy considerations that would support a *de minimis* doctrine. Respondents note than outside directors such as Messrs. Bacher and Merkle are valuable to such corporations as Borg-Warner. Respondents claim further that it is burdensome for directors of multinational corporations to search out every competitive overlap among all the [28] corporations for which they are directors. We recognize such realities. A corporation can, however, benefit from such industry experts in other ways, such as retaining such experts as consultants, without placing them in the position of ultimate corporate decisionmaking from which it is possible to fix prices or otherwise restrain competition—the matter with which the statute is ultimately concerned. Although consideration of the level of commerce affected is appropriate in determining the scope of any order issued for violations of this Section,[29] we hold that there

[27] Respondents further contend that the Commission has established a *de minimis* standard by entering several consent orders in which respondents could not share directors with competing corporations if a certain level of commerce or a certain percentage of respondents' business were implicated (RAB 38–41). These cases did not, as respondents contend, "license violations of the law" in certain levels of commerce, nor did they establish a *de minimis* standard. Rather, the consent decrees reflected an exercise of the Commission's discretion not to prosecute Section 8 violations in particular situations. Respondents' reliance on these cases for a legal proposition is even more misplaced because consent orders are the product of negotiation and compromise and do not establish the criteria against which litigated cases are to be measured. *See United Van Lines, Inc. v. United States,* 545 F.2d 613, 618 (8th Cir. 1976); *see generally United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235–37 (1975); *United States v. Armour & Co.,* 402 U.S. 673, 681–82 (1971).

[28] *See supra* notes 4, 6 and accompanying text.

[29] Level of commerce considerations also may be relevant in a decision whether to exercise prosecutorial discretion to bring a Section 8 complaint. Several lines of parts involving millions of dollars in commerce were alleged in the complaint to be competitive in this case, however—clearly not *de minimis* commerce for purposes of a decision to issue a complaint against respondents.

is no *de minimis* defense to a Section 8 violation.

V. SECTION 5

Respondents claim that the Administrative Law Judge erred in finding, as an alternative to Section 8 liability, that respondents' conduct violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. We find that respondents violated Section 5, because a violation of Section 8 is in itself a violation of Section 5. *See FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 239–44 (1972) (Section 5 encompasses violations of letter and spirit of antitrust law); *TRW, Inc.,* 93 F.T.C. at 386 n.22 (based on Section 8 violation, Section 5 violation found); S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (Section 5 encompasses interlocking directorates). We do not reach the issue whether respondents' interlocking directorates would have been an unfair method of competition under Section 5 absent a violation of Section 8.[30]

VI. REMEDY

The ALJ's order directs that Messrs. Merkle and Bacher resign either from the board of Borg-Warner or from the boards of Bosch GmbH and its subsidiaries. The order further directs that respondent corporations shall not establish director interlocks with any other competing corporation in "the production or sale of any product or service." The order also requires, for a [**29**] period of ten years, that corporate respondents obtain from their directors a list of such persons' other corporate directorships and the products or services produced by such corporations. Respondents must file compliance reports annually for ten years showing their adherence to the terms of the order. The order itself is in perpetuity.

Respondents contend that even if a Section 8 violation is found in this case, the order recommended by the ALJ is inappropriate and even punitive because the violation found was a "technical" and "narrow one" (*see* RAB 49; I.D. 58). In particular, respondents object to the breadth of the order's coverage; its perpetual nature; its "elaborate and burdensome" compliance reporting requirements; its lack of a floor level of competitive overlap at which interlocking directorates must be scrutinized in order to comply with the order; and its application to potential corporate overlaps involving firms other than respondents. Complaint counsel, for their part, would extend the order to proscribe officers, employees, or agents of one respondent (Bosch) from sitting on the board of the other (Borg-Warner).

[30] In *Perpetual Fed. Sav. & Loan Assoc.,* the Commission found that Section 5 could reach director interlocks between banks and a savings and loan association, even though Section 8 did not reach such interlocks, because such interlocks violated the policy of Section 8. *See* 90 F.T.C. 608, 652–57 (1977), *rem'd on other grounds,* No. 78–1134 (4th Cir. Nov. 10, 1978), *order withdrawn,* 94 F.T.C. 401 (1979).

We approach our decision on the scope of the order in this case with well-settled standards. Commission orders must be reasonably related to the unlawful practices found to exist.[31] The Commission has wide discretion in the choice of relief it deems adequate to remedy unlawful practices, *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), and when a respondent has been found in violation of the law, it must expect some "fencing in," *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957). In this instance, the order issued by the Administrative Law Judge is typical of those issued in Section 8 proceedings in the past.

We agree with the ALJ that an order should issue against all respondents in this case. Even though Messrs. Merkle and Bacher apparently resigned their directorships with Bosch U.S. (after the trial in this case),[32] respondents did not maintain that these individuals discontinued service as directors of Bosch GmbH or Borg-Warner. As this opinion has affirmed, common directorships between Borg-Warner and Bosch GmbH violated Section 8 of the Clayton Act; this violation continued unabated beyond the resignation of the individual respondents from the Bosch U.S. board. Nor is this a violation situation in which directors are interlocked without knowledge of corporate overlaps. (CX 29I; I.D.F. 57; CPF, at 98; *see supra* note 21). Moreover, there is a [30] "cognizable danger" that a violation could recur with respect to Bosch U.S. in its future board elections. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Resignation from a board by an interlocked director at the onset of Section 8 litigation has been consistently held insufficient to prevent entry of an order against both individual and corporate respondents. *See id.* at 633–34; *Kraftco Corp.*, 92 F.T.C. 416, 419 (1978), *aff'd sub nom. SCM Corp. v. FTC*, 612 F.2d 707 (2d Cir.), *cert. denied*, 449 U.S. 821 (1980). The order is necessarily and properly applicable, therefore, to all three corporate respondents. Because of the death of individual respondent Hans Bacher, an order provision with respect to individual respondents will be limited to Hans Merkle.

Some recent Section 8 decisions have addressed whether injunctive relief is appropriate beyond the undoing of the immediate interlocking directorates that are the subject of the Section 8 proceeding. In *SCM Corp. v. FTC*, 565 F.2d 807, 812–13 (2d Cir. 1977), the Court of Appeals for the Second Circuit remanded a Section 8 proceeding to the Commission because the Commission had failed to acknowledge that it bore the burden of showing a "cognizable danger of recurrent violation" as justification for an order barring future interlocks, citing *United States v. W.T. Grant Co.*, 345 U.S. at 633. On remand, the

[31] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428–30 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946).

[32] *See* Letter from Joseph A. McManus, Esq., *supra* note 1.

Commission reimposed its order after an analysis under the appropriate standard, and that order was upheld by the court of appeals.[33] Likewise in *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit declined to approve a prospective order where a director had removed himself from any interlock prior to the initiation of litigation by the government.

In these two cases, the courts included among the considerations relevant to assessment of the "cognizable danger" component of injunctive relief the following: whether an interlocking directorate was voluntarily discontinued prior to the onset of Section 8 litigation, whether respondents promised to avoid interlocking directorates in the future, and whether there was evidence of a Section 8 compliance program in operation. In this case, Drs. Merkle and Bacher only resigned from the Bosch U.S. board after the trial was virtually complete, and have remained interlocked on both the Borg-Warner and Bosch GmbH boards. Nor does there appear to be record evidence of any effort by respondents to prevent future interlocks, or to establish a systematic compliance program. On the contrary, respondents seem not to have screened their directors for interlocks in this case (RARB 31), and are determined to maintain the closest of Bosch corporate company control over Borg-Warner (RB 43). **[31]**

While we believe that injunctive relief barring future interlocks is appropriate in this case, we do agree that the order entered by the ALJ should be limited in three important respects suggested by respondents. Rather than a perpetual ban on all relevant competitive interlocks, a ten-year ban, tracked by the compliance reporting system already in the ALJ's order, would seem to guard against the continuation of Section 8 problems for the foreseeable future.

We also believe that prospective relief applicable to these corporate respondents and other corporations (Paragraphs I(b) and II(b) of the Final Order) should be limited to automotive parts for the automotive aftermarket. Traditional Section 8 relief tracks the "all products" relief contemplated in the complaint's Notice Order and proposed by the ALJ, but the Commission believes that the competitive concerns identified in this proceeding and the evidence on the likelihood of repeated interlocks justifies a narrower order. This record, in focusing on three types of specific automotive parts for the aftermarket, does not provide an all-inclusive definition of such automotive parts. There was testimony and documentary evidence, however, describing the lines of parts sold by the corporate respondents at the time of the proceeding,[34] and it is to these parts that the order proscription ap-

[33] *Kraftco Corp.,* 92 F.T.C. 416 (1978), *aff'd sub nom. SCM Corp. v. FTC,* 612 F.2d 707 (2d Cir.), *cert. denied,* 449 U.S. 821 (1980).

[34] Specifically, we refer to the parts sold by Borg-Warner's Automotive Parts Division (Reichers 623), and the ASM and ASD divisions of Bosch U.S. (Bendixen 894–895, CX 17A–Z 284).

plies. Thus the prospective relief applicable to corporations other than the named respondents themselves is confined to the actual range of automotive parts sold by these respondents during the course of these proceedings.

Finally, we believe that respondents' compliance obligation with these prospective provisions of the order should not extend below overlapping levels of commerce found in this proceeding with respect to interlocks between respondents and other corporations. Complaint counsel alleged in the complaint that the competitive overlap between Borg-Warner and Bosch U.S. involved several closely related product lines encompassing multimillion-dollar sales. Only three product lines proved to be competitive, however, involving approximately $900,000 and $5.4 million in sales for the respective corporations. These are relatively small fractions of the total business of these corporations, and in shaping relief we are convinced that other than in interlocks between these corporate respondents, the public interest is served in requiring respondents to submit reports of competitive overlaps of $5 million or more. As between these respondents, however, we believe traditional relief, without limitations as to products or volumes of commerce has been justified in this record. **[32]**

Complaint counsel seek an order that would extend beyond director interlocks to officers, employees, or agents of respondents. The logic of such relief is that whatever danger of collusion adheres in director interlocks can be achieved through the use, for instance, of an officer of one corporation as a director of another. Evasion of an order barring only interlocking directors is therefore relatively easy, and these respondents have indicated already their intention of using nondirector Bosch representatives on Borg-Warner's board should an order be entered. Nevertheless, Section 8 speaks only of interlocked *directors* and Congress has repeatedly declined to amend the statute to extend its prohibitions (RAIB 7). No litigation under Section 8 has resulted in an order such as that pressed by complaint counsel on this point. The statute's limitation is based on concern about ultimate corporate decisionmaking, and does not seem aimed at the suppession of all intercorporate relationships or information exchanges. The antitrust laws other than Section 8 remain to guard against improper communications between such non-director personnel. Accordingly, we deny complaint counsel's appeal on the scope of this order.

Finally, we note that during the pendency of this proceeding the Bosch companies underwent a corporate reorganization. *See* Letter from Joseph A. McManus, *supra* note 1. We believe that the competitive concerns raised by this reorganization in light of this case are satisfied by an order that is binding on the named respondents and

their successors and assigns.[35]

VII. RESPONDENTS' POST-TRIAL MOTIONS

Respondents initiated two rounds of post-oral-argument briefing, based on developments beyond the record of this proceeding. The first of these was initiated by a motion filed on August 20, 1981, raising the issue of alleged *ex parte* communications between staff and the Commission involving this matter and the Commission's July 23, 1981, issuance of a complaint in Docket No. 9157. The latter case is a Section 7 Clayton Act proceeding that challenges Borg-Warner's sale of its Automotive Parts Division (APD) to Echlin Manufacturing Corporation. Respondents asserted that arguments made in connection with our deliberations on the complaint in Docket No. 9157 were incestuously related to product market issues involved **[33]** in this proceeding. By order of May 13, 1982, the Commission granted in part and denied in part respondents' motion for full disclosure and access to records, in disposition of this issue. We believe the Commission's order demonstrates that the Commission has scrupulously adhered to the principles of both the Administrative Procedure Act and the Commission's rules of procedure in dealing with these alleged *ex parte* matters.

The second round of briefs in this matter was occasioned by respondent's December 14, 1981, "Motion by All Respondents to Dismiss Proceeding for Lack of Public Interest, or Alternatively, to Defer Decision on Appeal Pending Consideration of New Clayton Section 8 Guidelines." In this motion, respondents argue for dismissal of this proceeding because its continuation is no longer in the public interest. The basis for the argument is, first, that the competitive overlaps in the interlocking directorates case are very small, and, as a consequence, any finding of a violation of the Clayton Act would be "very narrow and technical" (RMD 2). Second, respondents argue that this proceeding has been mooted by the exit of Borg-Warner from the automotive parts business through the sale of APD to Echlin. Third, respondents in effect incorporate their *ex parte* communications argument, the subject of the August 20, 1981, motion, as part of their motion for dismissal of this proceeding.

Respondents' alternative motion, to defer issuance of a Commission decision in this matter, is based on suggestions that the Commission should first promulgate Clayton Act Section 8 enforcement policy guidelines on interlocking directorates. Respondents declare that

[35] As discussed above, the order prohibits various interlocks between corporate respondents (or their successors and assigns) and between corporate respondents and other corporations. The order, of course, only prohibits interlocks between corporations that are competitors. In determining whether a corporation is a "competitor," the business of any subsidiary that is subject to actual or substantial control of the parent will be imputed to that parent (*See* Section III *supra*).

such guidelines might bear on issues raised in this case such as on whether there should be created a *de minimis* competition exception to Section 8 liability, and whether Section 8 can be applied to an interlock involving the foreign parent of an allegedly interlocked competing subsidiary firm.

Most of the issues raised in respondents' motions are dealt with in this opinion. Two issues are raised that bear additional consideration, however. The Commission has not promulgated Section 8 guidelines, and even if it had, the issuance of guidelines relating to prosecutorial discretion over case selection or investigative review would not, as respondents seem to suggest, determine what constitutes a violation of law in any particular adjudicative context.

More significantly, we do not agree that this case has become moot because Borg-Warner has sold its Automotive Parts Division, removing the alleged competitive overlap that is the focus of this case. It is well settled that "voluntary cessation of illegal conduct" does not make a Section 8 case moot. *United States v. W.T. Grant Co.,* 345 U.S. at 632. A Section 8 case is mooted only if the respondent or defendant can demonstrate that there is "no reasonable expectation that the wrong will be repeated. The burden is a heavy one." *Id.* at 633; *TRW, Inc. v.* [34] *FTC,* 647 F.2d at 953; *SCM Corp. v. FTC,* 565 F.2d at 812. The concern is with repeated violations of the same law, not merely with repetition of the same offensive conduct—that is, the interlock challenged in the particular case. *TRW, Inc. v. FTC,* 647 F.2d at 953. We do not think that defendants have met their burden to show that there is no reasonable expectation of future violation. Moreover, Borg-Warner's effort to sell its APD is the subject of an ongoing Section 7 Clayton Act proceeding that, according to the Notice of Proposed Relief, seeks divestiture or, alternatively, rescission of the Borg-Warner sale of APD. Although respondents believe the potential for rescission of the APD sale is purely "speculative," we believe to the contrary that such a prospect illustrates the speculative nature of the mootness argument itself.[36] In view of the factors discussed here and in Section VI *supra,* we also find that despite the sale of the Automotive Parts Division there is a "cognizable danger" of a recurring violation of Section 8 sufficient to warrant issuance of a cease and desist order. The Commission's order provision requiring the individual respondents to resign from either the Borg-Warner or Bosch

[36] "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n, Inc.,* 393 U.S. 199, 203 (1968), *rev'g* 273 F.Supp. 263 (S.D.N.Y. 1967), *on remand* 1969 Trade Cas. (CCH) ¶72,719 (S.D.N.Y.).

The present case presents a situation unlike that in *United States v. Cleveland Trust Co.,* 392 F.Supp. 699 (N.D. Ohio 1974), *aff'd mem.,* 513 F.2d 633 (6th Cir. 1975), in which one of the interlocking corporations mooted the case by selling the division that produced its competitive line of commerce. Here, the pending Section 7 case challenging such a sale raises more than mere "conjectural" concerns that a violation could recur. *See id.* at 710.

boards, however, does not come into force until and unless there is competition between the corporate respondents. [35]

Should any future change of law or fact occur with regard to matters raised in this case, respondents have available the remedies set out in the Commission's Rules of Practice at Sections 2.51 and 3.72, 16 C.F.R. 2.51, 3.72 (1982), providing the right to petition the Commission to reopen and to modify or to set aside an order, based on changed conditions of law or fact or other public interest considerations not now before the Commission.

We believe that respondents' motions of December 14, 1981, must be dismissed.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III*

Today the majority interprets the relevant statutory and case law as requiring ineluctably the conclusion that Section 8 of the Clayton Act is what may be termed a "strict" *per se* statute that is unconcerned with whether the "offending" director interlock helps or harms competition, or whether the extent of competitive overlap between the interlocked firms is massive or trivial. In so holding, the majority's opinion fails even to acknowledge what Commissioner Clanton correctly characterizes as the "potentially harsh effects" of a Section 8 strict *per se* rule (Clanton Statement at 1.)[1] much less make any effort to avoid them. The majority concludes that Congress and the courts leave this Commission no alternative but to strike down the interlock in this case because at the time the complaint issued in November 1978, Borg-Warner and Bosch U.S. were "competitors" in the sale of certain automotive aftermarket products. Section 8 condemnation must, reasons the majority, automatically ensue. [2]

Rather than adopting the majority's strict *per se* standard, I would follow the rule of the better-reasoned cases and hold that interlocks with an insignificant or "*de minimis*" effect on competition do not violate Section 8. I would therefore remand this matter to the ALJ to consider evidence of the likely competitive effect of the interlocks challenged here. I would also remand on the issues of whether Borg-Warner's post-oral-argument sale of the overlapping assets—coupled

* Commissioner George W. Douglas joins in this dissenting statement.

[1] The following abbreviations are used in this opinion:

Maj.Op.—Majority Slip Opinion
Bailey Op.—Separate Concurring Opinion of Commissioner Patricia Bailey
Clanton Statement—Concurring Statement of Commissioner David Clanton
ID-Initial Decision Page Number
IDF-Initial Decision Finding Number
Tr.-Transcript of Testimony Page Number

with the resignation of the individual directors—either moots this proceeding or makes issuance of any order unnecessary.

I. A STRICT PER SE RULE UNDER SECTION 8 IS UNNECESSARY AND UNWISE

I depart from the majority on several determinative issues. Most fundamentally, I cannot agree with the majority's unnecessarily expansive view that Section 8 mandates purposeful disregard of the competitive effects of the challenged interlock. I find the wording of Section 8 consistent with considering competitive effects; the legislative history internally contradictory but equally supportive of conclusions contrary to those embraced by the majority; and the case law on the critical issues sparse, conflicting, and indeterminative. Moreover, I view the interpretation of Section 8 as a strict *per se* statute to be inconsistent with sound application of antitrust policy.

A. *The Language of Section 8 Is Vague And Does Not Require A Strict Per Se Result*

It is a desirable attribute of our political system that Commissioners—like other adjudicators—have limited power. We are constrained in our adjudications by the wording of the laws we are charged to apply and interpret. Nevertheless, to the extent the language of Congress permits, our goal in interpreting and applying the antitrust laws should be to discourage anticompetitive and inefficient practices that diminish consumer welfare on the one hand, and to encourage procompetitive and efficient practices on the other. Where the language of a statute leaves no choice but to reach an anticompetitive, inefficient, or otherwise harsh result in a pending litigation, it becomes our unhappy duty to apply the law as mandated. But it is for Congress to place us in that situation. Absent specific legislative command, we need not—and should not—presume that [3] Congress intended to condemn the beneficial and the harmless together with the pernicious.

One irony of the majority's decision is that it renders unlawful under Section 8 of the Clayton Act the sharing by two competing firms of one director even in situations where it would be lawful under Section 7 of the same statute for the two firms to merge completely and share an entire board of directors. Further, it does so even if the interlocked firms each produce but an infinitesimal fraction of the relevant industry's output. Since these two sections were adopted simultaneously by the same Congress, I believe it abundantly clear that the Commission and the courts should avoid stretching to reach such inconsistent (indeed, surprising) results unless that is what Congress clearly intended.

To determine precisely what legislative command Congress has given the Commission and the courts in Section 8 cases, we must examine closely the disputed statutory provision. In pertinent part, Section 8 of the Clayton Act provides—as it did when enacted in 1914:[2]

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, *competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.*[3] (Emphasis added)

The underscored portion is generally referred to as the "so that" clause, the focal point of the analysis of whether Section 8 embodies a *de minimis* exception or otherwise applies only to interlocks having (or likely to have) some minimal impact on competition. [4]

On its face the "so that" clause arguably contemplates at least some consideration of competitive effects, although a number of questions can be asked concerning the precise scope of the inquiry. For example, does the clause contemplate that all competition between the interlocked firms would b eliminated by agreement (as in a merger or a market or customer division), or simply one aspect of competition (as in an agreement to fix prices or to refrain from advertising)? Must there be a total elimination of competition, a substantial reduction in competition, or a minimal or even potential impact on competition? Does the clause require that the interlocked firms have sufficient combined market power to effectuate the "elimination"? Does "elimination of competition" refer only to competition between the interlocked firms, or does it mean elimination of all competition throughout the relevant market? Is the "so that" clause not intended as a conditional at all, but rather as a mechanism for bringing the interstate commerce requirement into play? The statutory language affords no ready answer to these questions.[4] [5]

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[2] *See United States v. Crocker National Corp.*, 656 F.2d 428, 431 n.1 (9th Cir. 1981) (comparing language of present and original Section 8), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[3] 15 U.S.C. 19 (1973).

[4] Even commentators cited by Commissioner Bailey's concurrence (Bailey Op. at 12–13.) indicate the extent of the ambiguity created by the language of Section 8. Two years after Section 8 was enacted, one treatise addressed the meaning of the "so that" clause:

> It would be difficult to conceive a more uncertain and shifting standard of corporate conduct than this one, by which the question of what elimination of competition between two [interlocked] corporations by agreement would constitute a violation of the antitrust laws, is made the test of the lawfulness of [a competitor interlock].

J. Harlan & L. McCandless, *The Federal Trade Commission, Its Nature and Powers* 20 (1916). Similarly, ten years after Section 8's passage another commentator wrote:

> The difficulty in applying the test lay in the fact that no one could state with assurance under what circumstances the elimination of competition by agreement would constitute a violation of the anti-trust laws.

(footnote cont'd)

Uncertainty as to the meaning and purpose of the "so that" clause is reflected in the legislative history of Section 8. As discussed below, many of the Senators voting on the measure found the clause vague and imprecise. (Indeed, a number of Senators rejected criminal penalties for violations of Section 8 because it lacked the certainty required of criminal laws.[5]) Moreover, the first court to consider its meaning concluded that "the clause is not crystal clear," and accordingly turned to portions of the legislative history in an attempt at clarification.[6]

Resort to legislative history is always an uncertain undertaking, to be avoided if possible. But where the language of the statute is inescapably ambiguous,[7] the courts and the Commission have been forced to this sometimes dangerous and always imperfect source of legislative intent. I am generally wary of placing great reliance upon legislative history, dependent as it is upon individual or committee (rather than majority) expressions of opinion. However, where, as here, a line of case law has developed in an unfortunate direction on the basis of an incomplete interpretation of the legislative history,[8] further resort to that history would seem justified to right the wrong. [6]

B. *The Legislative History Of Section 8 Neither Requires Nor Supports A Strict Per Se Rule*

The Senate and House Judiciary Committee Reports[9] provide little insight into the Congressional intent behind Section 8. Both cite an address by President Wilson to Congress inveighing against trusts in general and interlocks in particular. Neither sheds much light on the intended extent of the interlock prohibition.[10] The conference [7] com-

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G. Henderson, *The Federal Trade Commission, A Study In Administrative Law and Procedure,* 38–39 (1924).

[5] *See* page 12 below.

[6] *United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614, 617 (S.D.N.Y. 1953). The paragraph of Section 8 containing the "so that" clause is not the only unclear aspect of Section 8. *See, e.g., SCM Corp. v. FTC,* 565 F.2d 807, 809–10 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980) (in concluding Section 8 applies to corporations as well as to individual directors, the court said, "It is true that if the language of the section is considered alone, the result is not clear"), *remanding on other grounds, Kraftco Corp., et al.,* 89 F.T.C. 46, 61–62 (1977) ("the language of Section 8 read *in vacuo* perhaps leaves some doubt as to the entities its proscription is intended to cover").

[7] *See, e.g., United States v. Universal C.I.T. Corp.,* 344 U.S. 218, 221 (1952) ("we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress").

[8] *See* discussion of *United States v. Sears, Roebuck & Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953) in Part I(C) below.

[9] S. Rep. No. 698, 63d Cong., 2d Sess. (1914) (hereafter "Sen. Jud. Rep."); and H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914).

[10] *Accord, United States v. Sears, Roebuck & Co.,* 111 F.Supp. 614, 616 (S.D.N.Y. 1953).

Among the segments of legislative history relied upon by Commissioner Bailey's concurring opinion to support the view that Congress intended a strict *per se* test to apply is the following quotation from the Senate Judiciary Committee's Report summarizing the Clayton Bill:

> Among other of these trade practices which are denounced and made unlawful may be mentioned . . . interlocking directorates.

Bailey Op. at 9, *quoting* Sen. Jud. Rep. at 1. However, the portion that is omitted from the quoted excerpt is also instructive. The full quotation is as follows:

> Among other of these trade practices which are denounced and made unlawful may be mentioned *discrimina-*

(footnote cont'd)

mittee report is silent on the scope of Section 8 with respect to competitor interlocks in general, and on the meaning of the "so that" clause in particular.[11]

The House Report acknowledges the committee's attempt to draft Section 8 so as to implement the recommendation of President Wilson that all interlocks be prohibited.[12] It is significant that the House Report makes no direct mention of any danger to competition posed by director interlocks. Indeed, the principal goal of Section 8 that might be gleaned from the report is a desire to promote President Wilson's goal of permitting "new blood" to enter the realm of corporate management, and thereby "immensely hearten the young men coming on."[13] The report also emphasizes a perceived need to check the "concentration of wealth, money, and property" under the control of "a few individuals or great corporations."[14] One of three sets of minority views included in the report states that Section 8 is "full of difficulty and peril" for small corporations, and would affect them in far greater degree than it would larger corporations.[15] It further declares:

> The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden.[16]

However, the full House debated neither this question nor other relevant competitive issues.[17] [8]

The full Senate did debate the *per se* issue, and the record of that debate furnishes a guide to Congressional intent that must not be overlooked. The Senate Judiciary Committee reported the Clayton bill to the Senate floor, where one of the committee members—Sena-

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tion in prices for the purpose of wrongfully injuring or destroying the business of competitors; *exclusive and tying contracts; holding companies;* and interlocking directorates. (Sen. Jud. Rep. at 1, emphasis added.)

In the version of the Clayton Bill reported out of the Senate Judiciary Committee, only two of the omitted four practices (exclusive dealing and tying arrangements) were subject to the strict *per se* illegality standard that the majority is so intent on imposing upon competitor interlocks. *See* Sen. Jud. Rep. at 54–69. Moreover, in the final version of the Clayton Bill enacted into law (as well as under current antitrust law), *none* of the four omitted practices were outlawed under a strict *per se* rule. *See Id.* at 54–56, 60–61; 15 U.S.C. 13(a) (b), 14, and 18 (1976); *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 328–29, 333–35 (1961); and *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 498–500 (1969) (*"Fortner I"*).

Thus, to the extent the quoted passage illuminates the meaning of the "so that" clause, it can only be interpreted as cutting against any intention by Congress to adopt a strict *per se* condemnation of competitor interlocks.

[11] H.R. Rep. No. 1168, 63d Cong., 2d Sess. 13–16 (1914). *See* note 18 below.

[12] H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). *But see* note 57 below.

[13] H.R. Rep. No. 627, 63d Cong., 2d Sess. 18, 20 (1914).

[14] *Id.* at 19.

[15] *Id.* (Part 2, Minority Views) at 8.

[16] *Id.*

[17] 51 Cong. Rec. 9600–07 (1914). In the bill that ultimately became the Clayton Act, Sections 7 and 8 of the final Act were denominated Sections 8 and 9, respectively. Thus, the merger provision in the legislative history is Section 8, while the interlocking directorate section is Section 9. For convenience, I refer throughout this opinion to their final (and current) designation.

tor Cummins of Iowa—raised the subject of Sections 7 and 8. After stating his view of the policy embodied in the pending legislation, he read the relevant language of Section 8 as reported by the committee. This version was nearly identical to that adopted by the House,[18] and essentially the same as the present Section 8; it included both the $1 million corporate size threshold and the "so that" clause. (14,256.)[19] Senator Cummins believed those provisions were far too weak. He understood Section 8 to require proof "that a *consolidation* of the two corporations which are involved would be a violation of the antitrust law." (*Id,* emphasis added.) He went on to urge that:

> It ought to be unlawful for corporations that are engaged in competitive business to have a community of directors. It ought to be unlawful for any man to act as a director upon two corporations which are or ought to be competing with each other . . . (*Id.*)

The legislative history records no challenge to Senator Cummins' interpretation of Section 8 and his assessment of its worth. However, the course of the ensuing debate reveals that a majority of the Senators differed with his policy prescription.

During the ensuing floor debate, Senator Cummins introduced what was, in effect, a strict *per se* amendment deleting both the "so that" clause and the $1 million corporate [9] size exclusion, and extending the interlock prohibition to officers, as well as directors, of any firms "carrying on business of the same kind or competitive in character." (14,534.) Explaining his reasons for the amendment he stated that, under the original language, if an agreement "totally annihilating competition would *not* constitute a violation, then the [original] section would not apply." (14,535.) Senator Cummins maintained that the extra burden of proving that some agreement between the companies would violate existing law seriously weakened the interlock prohibition. (*Id.*) He also felt that Section 8, as reported, was a "half hearted and feeble way" to cure the perceived evil of interlocks. (*Id.*) It is difficult to see how a member of the reporting Senate committee could have taken such a position were it not clear that the original Section 8 provision was *not* a strict *per se* proscription of director interlocks.

A number of Senators spoke against the Cummins amendment, including other members of the Judiciary Committee. It is interesting that many of the reasons why strict *per se* condemnation of director interlocks is unwise antitrust policy today were advanced on the floor

[18] The Senate Judiciary Committee modified the "so that" clause by changing "*an* elimination of competition" to "*the* elimination of competition." Sen. Jud. Rep. at 48, 68. The full Senate approved the change, 51 Cong. Rec. 14,030–31 (1914), as did the subsequent conference committee. H.R. Rep. No. 1168, 63d Cong., 2d Sess. 14 (1914).

[19] Unless noted otherwise, parenthetical citations in the text refer to page numbers in Volume 51, Parts 13–16 of the Congressional Record, 63d Congress, 2d Session (July 22–Oct. 24, 1914).

of the Senate almost 70 years ago. These include the dangers of: impairing legitimate procompetitive business expansions;[20] reducing the number of [10] qualified directors available to corporations, especially to small firms;[21] discouraging investment and enterprise;[22] placing a premium on "dummy directors";[23] and increasing the difficulties confronting firms that are required to be incorporated in a state in order to do business there.[24]

Senator O'Gorman (N.Y.), another member of the Judiciary Committee, opposed the Cummins amendment as "unfortunate", arguing that the situation the amendment sought to remedy was already addressed adequately by the antitrust laws:

> [In the Clayton bill] we have supplemented the Sherman Antitrust Act; we have taken every reasonable step that is necessary to destroy monopoly; and, having done all that a suggestion is now made which is wholly unnecessary and which *can offer but a modicum of benefit while inflicting injury and imposing needless restraints upon American enterprise.* It is for this reason that I shall vote against the [Cummins] amendment. (14,540.) (Emphasis added)

Senator Chilton (W. Va.), still another Judiciary Committee member, explicitly opposed the strict *per se* approach in the amendment, saying: [11]

> That which experience teaches is necessary to legitimate success and which enables the enterprising man to expand his business *should not be made unlawful per se but only when it is made or becomes the handmaiden of monopoly or the restraint of trade.* (14,539–40.) (Emphasis added)

The arguments advanced by supporters of the Cummins amendment are also inconsistent with the Commission majority's conclusion

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[20] *See* remarks of Sen. Hitchcock (Neb.) (14,535.) (expressing concern that *per se* amendment might destroy or impair great deal of legitimate business expansions, citing wholesale grocery industry); Sen. Overman (14,536.) (same as to expansion of cotton mills via new incorporations with new boards sharing common directors); Sen. Lippit (14,536.) (interlocking directorates created by geographic expansions can be procompetitive and not dangerous); and Sen. Walsh (14,536.) (same, indicating preference for less restrictive rule than Cummins proposal). Senators Overman and Walsh were members of the Judiciary Committee.

[21] *See* remarks of Sen. Lippit (R.I.) (14,538.) (directors described as scarce source of efficiency; since sufficient number of independent, qualified persons are unavailable, ban on interlocks would detract from quality of many boards and could impair efficiency of all small corporations). *See also* Halverson, *Should Interlocking Director Relationships Be Subject To Regulation And, If So, What Kind?*, 45 Antitrust L.J. 341, 346 (1976) ("The realities of today's corporate world require that interlock regulation not be so severe as to diminish further the pool of qualified individuals who are willing to serve as outside directors"; cites recent business publication as indicating "individuals on the margins of [Section 8's] scope are expressing concern about accepting positions on corporate boards where the existence of competitive overlap is merely *de minimus* [sic]"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 155 (1979) ("Interlocks involving outside directors may yield advantages in terms of corporate productivity that outweigh any possible dangers of anticompetitive abuse, especially if there is a shortage of qualified 'expert directors' in a particular field").

[22] *See* remarks of Sen. Smith (Mich.) (14,538.) (citing numerous Michigan industries with interlocking directorates, Cummins' amendment called "a sweeping, a far-reaching, and an undesirable amendment, and it ought not be adopted").

[23] *Id.*

[24] *See* remarks of Sen. Chilton (W.Va.) (14,540.) (citing requirements in oil and coal industry, reincorporation in new states described as "beneficial process").

that Section 8, as ultimately enacted, was intended as a strict *per se* statute. For example, Senators Reed (Mo.) (Judiciary Committee member) and Jones (Wash.) both supported the amendment because they favored the proposal advanced by President Wilson and the Democratic platform—that *all* interlocking directorates be prohibited. (14,539–41.) Far from providing a clear-cut prohibition of all interlocks, Senator Jones viewed the provisions of Section 8 as "uncertain, indefinite, and ambiguous in terms and possible effect. We do not know what they mean." (14,542.) He further despaired that "The suggestions of the President were wise. We would have done well to follow them. We have not done so." (*Id.*)

With these words the Senate debate on the Cummins amendment ended. The amendment was defeated 15–44 (37 not voting). (14,543.) Of the 18 Judiciary Committee members,[25] 10 voted against the amendment (including the Committee's chairman) and only three voted for it (the remainder abstained). (*Id.*) The meaning of this segment of the legislative history of Section 8 is not without ambiguity. For example, it is unclear whether Senators arguing and voting against the Cummins amendment did so because they supported retention of the "so that" clause, the $1 million corporate size exception (or both), or for other reasons. But this ambiguity is sufficient to disprove the premise underlying today's majority opinion that the legislators clearly intended a strict *per se* proscription. [12]

It is reasonably apparent from this legislative history that the Cummins amendment was rejected because a majority opposed applying a strict *per se* rule to interlocking directorates. As the Senate floor debate reveals, the committee reporting the bill did not understand that Section 8 would be construed as a strict *per se* prohibition, since a majority of Judiciary Committee members voted against the Cummins amendment. Moreover, the above-described floor debate involving the Committee's membership indicates that the bill was intentionally flexible.

This legislative history reveals that the legislators were well aware of the resulting uncertainties in Section 8. Indeed, it is clear that, for a number of Senators, this uncertainty was a primary reason for the decision to remove criminal penalties from Section 8. For example, Senator Cummins concluded that he was against a criminal penalty in Sections 7 and 8 on the "ground that neither of them furnishes a rule of conduct, neither of them furnishes a standard that can be applied with that certainty that all criminal laws ought to be applied." (14,328; *see also* 14,254 and 14,325.) In the course of a debate on whether Sections 7 and 8 should be criminal provisions, Senator

[25] Amendments to Sherman Antitrust Law and Related Matters: Hearings on H.R. 15657 Before Subcomm. of the Senate Comm. on the Judiciary, 63d Cong., 2d Sess. (1914).

Chilton pointed out the danger that harsh penalties coupled with an ambiguous prohibition could create, stating, "We want to stop interlocking directorates as far as we can. But we . . . . do not want to destroy or to frighten legitimate business". (14,327.)

Treating Section 8 as encompassing a *de minimis* exception is not only more consistent with the specific legislative history, but also with the competitive concerns which underlay the enactment of the antitrust laws in general. For example, when the Clayton bill was reported from the House-Senate conference committee, debate ensued over whether addition of the words "may be" (substantially to lessen competition) and "or tend to" (create a monopoly) in Section 7[26] had weakened the bill. Senator Walsh (Mont.) [13] defended these changes, noting that there is little difference between finding that competition has been damaged substantially and demonstrating that commerce restrained by any violation was more than *de minimis*. He expressed the common understanding that the Sherman Act was not intended to reach *de minimis* violations and that *de minimis* is understood in terms of competitive effect:

> The Sherman Act denounces all combinations in restraint of commerce, but no combination falls under the ban of the statute unless *commerce is restrained* to a "substantial" extent. *De minimus [sic] non curat lex.* (16,149.)[27]

In short, contrary to the Commission majority's position that "Implicit in the statute's million-dollar net worth requirement and explicit in the legislative history of Section 8 is the judgment of Congress that the size of the interlocked corporations is the crucial *de minimis* inquiry" (Maj.Op. at 23.), the legislative history of Section 8 provides ample support for the conclusion that it was designed to permit benign competitor [14] interlocks. Numerous statements made during

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[26] The effect of the conference committee's changes was to insert the bracketed terms into, and delete the stricken terms from, the Senate version of Section 7:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition [may be] substantially [to] lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, [or to restrain such commerce in any section or community,] or [tend] to create a monopoly of any line of commerce.

Sen. Jud. Rep. at 60; H.R. Rep. No. 1168, 63d Cong., 2d Sess. 3 (1914).

[27] Senator Walsh went on to cite an example of the consequences of not requiring some substantial injury to competition:

> How much reason there is to dread disastrous results from such a construction is exhibited by the decision in the *Union Pacific-Southern Pacific* case, in which the traffic affected by the combination amounted only to eighty-eight one-hundredths of 1 per cent of the total tonnage of the Southern Pacific. Yet the court held that the restraint of trade was substantial enough to bring the combination under the condemnation of the law. (16,149.)

See United States v. Union Pacific Railroad Co., 226 U.S. 61, 88 (1912) ("while these roads did a great deal of business for which they did not compete and . . . the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars").

the Senate debate as to the intended flexibility of the statute, the uncertainties connected with enforcement, and the competitive inquiry inherent in a *de minimis* analysis, all tend to support the view that those who enacted Section 8 did not intend it to apply solely on the basis of a clearly articulated dollar cutoff point. Rather, it was intended to contain enough flexibility to preserve interlocks where they are useful and beneficial while prohibiting those likely to threaten competition.

C. *The Case Law Is Mixed And Does Not Dictate A Strict Per Se Rule Under Section 8*

Contrary to the impression left by the majority's opinion today, the courts have not conclusively resolved the *per se/de minimis* question. In approaching this issue, it is important to keep three facts in mind. First, as noted, the language of Section 8 itself is unclear and susceptible of alternative interpretations. Second, only a handful of courts have ever considered the issue. And third, the Supreme Court has never decided or even considered the meaning of the "so that" clause or the existence of a *de minimis* exception to Section 8.

It is also important to distinguish among *per se* illegality, the *de minimis* concept, and the $1 million corporate size exemption in Section 8. These concepts need not be mutually exclusive. The strict *per se* approach the majority endorses apparently forecloses any consideration of competitive effects. However, the better approach in construing Section 8 would be to require establishing a threshold factual predicate—that the competitive effects of the interlock at issue are likely to be non-trivial—before imposing liability, *per se* or otherwise. A *de minimis* exception simply means that if the *competitive* impact of the interlock can readily be shown to be *de minimis*—most appropriately viewed in terms of the extent and nature of the competitive overlap, not the size of the allegedly interlocked firms—no violation has occurred.

One need not do an exhaustive rule of reason or Section 7 analysis in all (or even most) cases to determine whether any such competitive overlap would be trivial. Thus, a [15] *de minimis* exception does not vitiate the *per se* rule; the two can logically co-exist. If annual industry sales could be shown to be $100 million, for example, and the two interlocked firms' combined overlapping sales were shown to be $1,000, or if overlapping sales constituted only a minute fraction of each firm's revenue, it should be reasonably clear that an exhaustive rule of reason analysis would not be required to determine that the competitive overlap was *de minimis* and that no Section 8 liability should attach. Under the majority's decision, of course, liability would exist. Finally, the *de minimis* principle does not relate to corporate size;

instead, it relates to competitive effects. Section 8's $1 million corporate size limitation is therefore not properly viewed as one demarcating what constitutes *de minimis* competition.

The legislative history outlined above has not been examined closely in most Section 8 cases. Only two of the cases that have considered the "so that" clause have examined Section 8's legislative history in any detail—*United States v. Sears, Roebuck & Co.*[28] and *United States v. Crocker National Corp.*[29] Because the holding and analysis in *Sears* has formed the basis for virtually all subsequent precedent on the "so that" clause, I begin my discussion of the case law there.

The district court in *Sears* concluded generally that "a fair reading of the legislative debates leaves little room for doubt" that Congress enacted Section 8 to reach "incipient" antitrust violations.[30] However, with respect to the meaning of the "so that" clause, the court concluded:

> [t]he legislative history of §8 is inconclusive on the precise question before [the court]. It affords no [16] evidence permitting progress from speculation toward certainty. (Emphasis added)[31]

Elsewhere, in discussing whether the "so that" clause meant an interlock was unlawful under Section 8 only if a "consolidation" or merger of the corporations would violate the antitrust laws, the *Sears* court stated:

> We can, therefore, do no more than speculate as to whether or not it was the sense of Congress that §8 invoked only the consolidation test.[32]

The court briefly discussed the debate over Senator Cummins' amendment, and the fact that Cummins characterized the proposed Section 8 language as a restatement of the Section 7 test. The judge declined to speculate whether the Senators expressed agreement or disagreement with Senator Cummins' characterization. The vote to reject the Cummins amendment, according to the court, could have meant that the Senators believed that the Cummins amendment added nothing to the reported bill and was hence unnecessary.

As shown above, however, the floor debate tells a different story. To the Senators of the Sixty-Third Congress, the Cummins amendment seems to have presented an unwanted tightening of the law that was rejected because they did not want to prohibit competitor interlocks

[28] 111 F.Supp. 614 (S.D.N.Y. 1953).

[29] 656 F.2d 428 (9th Cir. 1981), *rev'd sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[30] 111 F.Supp. at 616.

[31] *Id.* at 619.

[32] *Id.* at 618.

entirely. Moreover, it is reasonable to infer that the majority voting against the Cummins amendment did not agree with President Wilson's view that all competitive interlocks are harmful. Rather, the prevailing view seems to have been that efficiencies were available through interlocking directorates, and that only when those relationships created a danger to competition would they be prohibited by the antitrust laws. Finally, the legislative history does not establish that the Senators' desire for flexibility was satisfied by the $1 million minimum corporate size exemption. The numerous examples of procompetitive business expansions carried no such qualification. [17]

The *Sears* court concluded that a *per se* analysis is applicable to Section 8 cases.[33] Nevertheless, the court also recognized a *de minimis* exception—as the majority concedes (Maj. Op. at 23 n.23.)—when it stated:

> Surely the [overlapping] sales of $80,000,000 do not come within the de minimus [sic] principle.[34]

This statement, made in the context of the amount of interstate commerce affected by the interlock,[35] illustrates that the first court to construe Section 8—in a decision described by the majority as "The leading case interpreting the 'so that' clause" (Maj. Op. at 26 n.26.)—was unwilling to go as far in extending the reach of Section 8 as is the majority today.

The *de minimis* exception recognized in *Sears* was applied in a 1966 district court decision involving several facts similar to this case. In *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*,[36] the court—citing *Sears*—held that "*De minimis competition* is not encompassed by the proscription of §8."[37] Applying that standard, the *Paramount* court concluded that any direct competition between the defendant corporations and Paramount in the various types of entertainment products and services alleged by plaintiffs was *de minimis*, and dismissed the complaint on that basis (as well as on alternative grounds, including mootness). [18]

In my judgment, this *de minimis* rule makes far more sense as a matter of antitrust policy than the doctrinaire approach taken by the

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[33] *Id.* at 617, 620–21. *See* Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 839–40 (1968) (noting that "prior to the first judicial construction of [Section 8 in *Sears*], considerable doubt existed whether the statutory language would permit a construction of *per se* illegality"; *Sears* court described as employing "an ingenious constitutional argument" to avoid giving the "so that" clause substantive meaning as qualification of term "competitors").

[34] 111 F.Supp. at 621.

[35] The *Sears* court appears to have recognized the *de minimis* exception as arising from the restrictions of the commerce clause. Of course, the "so that" clause discussed above provides substantial support in and of itself for a *de minimis* exception.

[36] 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966).

[37] *Id.* at p. 82,065 (emphasis added).

majority today. Moreover, there is ample case support for this position. As the ALJ in this matter stated in weighing arguments for and against a *de minimis* exception, "Precedent may be found to support either position." (ID 47.) Unfortunately, as the ALJ also found,

> The record does not permit quantification with any degree of precision as to the overlap in the sale of import car parts in the relevant product lines to domestic [warehouse distributors] by Borg-Warner and Bosch U.S. (ID 46.)

Hence, I would remand this matter to the ALJ for consideration of whether the competitive overlap that formerly existed between the corporate respondents was *de minimis*. If the evidence established that it was, I would dismiss the complaint.[38]

In *United States v. Crocker National Corporation*,[39] the other case besides *Sears* to review the legislative history of the "so that" clause in any depth, the principal issue was whether Section 8 prohibited director interlocks involving banks, bank holding companies, and insurance companies. In the course of holding the interlock to be within the ambit of Section 8 (a determination the Supreme Court subsequently rejected), the court asserted (without citation):

> The initial formulation of the bar against interlocking directorates between competing corporations rested on the premise that elimination of competition between the corporations was to be presumed from the very existence of common directors. This remained the essence of the prohibition.[40] [19]

Several points bear mentioning in connection with this statement by the Ninth Circuit. First, the Supreme Court has recently reversed the Ninth Circuit decision in *Crocker*, concluding that Section 8 was not intended to cover interlocking directorates between banks and nonbanks (such as insurance companies).[41] Second, while the court of appeals affirmed the *per se* nature of Section 8 violations,[42] it was not faced with and did not reach the *de minimis* issue, since the parties had stipulated they were competitors and that the competition between them was "not insubstantial." Moreover, the defendant companies "waived any defense that the elimination of this competition by

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[38] The *de minimis* exception recognized by both the *Sears* and *Paramount* courts—and applied by the latter court to reject a finding of Section 8 liability—is the very approach that I propose the Commission adopt under Section 8. Thus, Commissioner Bailey is incorrect in asserting that "The dissenters have found no case that takes their contrary view." (Bailey Op. at 1.) Indeed, even the majority opinion concedes that "Courts nevertheless have disagreed about whether Section 8 forbids interlocking directorates if only a *de minimis* amount of commerce is involved." (Maj. Op. at 24.)

[39] 656 F.2d 428 (9th Cir. 1981), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[40] 656 F.2d at 438.

[41] *BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983).

[42] 656 F.2d at 438, *citing TRW, Inc. v. FTC*, 647 F.2d 942, 947 (9th Cir. 1981), and *United States v. Sears Roebuck & Co.*, 111 F.Supp. 614, 616–17 (S.D.N.Y. 1953).

agreement among them would not violate the antitrust laws."[43] Further, the court in *Crocker* made passing reference to the *Paramount* court's application of the *de minimis* exception, and gave no indication that it was rejecting that approach.[44]

However, the Ninth Circuit did address the *de minimis* exception a few months earlier in *TRW, Inc. v. FTC*.[45] In that case, interpreting the "so that" clause for the first time,[46] the Ninth Circuit asserted that in establishing a Section 8 offense, "proof that the interlock has an actual anticompetitive effect is not required,"[47] and, further, that "a *de minimis* exception is not contemplated by [Section 8]."[48] **[20]**

In concluding that "The statute contains nothing that suggests a requirement of some substantial quantum of competition,"[49] the Ninth Circuit appears to have discarded all other plausible interpretations of the ambiguous "so that" clause but its own.[50] In any event, the Ninth Circuit's holding in *TRW* that there was no *de minimis* exception was arguably unnecessary to its conclusion. In its own decision in *TRW* in 1979, the Commission wisely refrained from deciding the issue unnecessarily, holding simply that if there were a *de minimis* exception to Section 8, the respondents in that case failed to prove it applied to them.[51] Had the question been so clear as the majority implies today, one suspects that the Commission would have so indicated in its *TRW* decision.

The final "so that" clause case relied upon by the majority to support its strict *per se* conclusion is *Protectoseal v. Barancik*,[52] in which in its first Section 8 case the Seventh Circuit appeared to apply a *per se* standard. However, for several reasons *Protectoseal* affords little support for a *strict per se* rule. First and most important, the Seventh Circuit did not reach the *de minimis* issue, since it was alleged by the plaintiff (in a summary judgment context) that the interlocked firms together accounted for 50 percent of the market in which they com-

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[43] 656 F.2d at 433.

[44] *Id.* at 451 n.81.

[45] 647 F.2d 942 (9th Cir. 1981).

[46] *Id.* at 946.

[47] *Id.* at 947. The sole authority cited for this proposition is a 1973 decision by the Seventh Circuit in *Protectoseal Company v. Barancik*, 484 F.2d 585 (7th Cir. 1973), discussed below, which adopted essentially a *per se* approach but did not reach the *de minimis* issue.

[48] 647 F.2d at 948.

[49] *Id.*

[50] In construing the "so that" clause to preclude a *de minimis* exception, the *TRW* court cited the 1940 *Socony-Vacuum* decision's *per se* rule against horizontal price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–23 (1940), as somehow showing that Congress by enacting the "so that" clause in *1914* "plainly meant to reach interlocks between competitors without regard to the amount of commerce that might be restrained." 647 F.2d at 948. However, one of the two district court cases cited by the *TRW* court for this proposition was *Sears*, which itself expressly recognized a *de minimis* exception to Section 8. (The second was the district court's decision in *Crocker*, now reinstated by the Supreme Court.)

[51] *TRW, Inc., et al.*, 93 F.T.C. 325, 385–86 (1979), *aff'd in part*, 647 F.2d 942 (9th Cir. 1981).

[52] 484 F.2d 585 (7th Cir. 1973).

peted.[53] Second, *Protectoseal* itself cited for [21] support only the 1953 *Sears* case (recognizing a *de minimis* exception).[54] And third, the Seventh Circuit's conclusion as to the legal standard was based upon an apparent misreading of the critical language of the "so that" clause. In concluding that the language of the clause "implies that a market-wide analysis of competition is unnecessary",[55] the court of appeals was construing its own inaccurate quotation of the clause that omitted the bracketed words:

> They must be "competitors, so that the elimination of competition [by agreement] between them would constitute a violation of the provisions of any of the antitrust laws."[56]

Thus, with respect to its "market-wide analysis" holding, the *Protectoseal* court appears to have misread Section 8's "so that" clause to refer to *competition* between the interlocked competitors, rather than to competition in the relevant market being eliminated *by agreement* between them. Its resulting conclusion on the legal standard intended by Congress should be discounted accordingly.

The majority relies heavily on this uncertain precedent in rejecting respondents' contention that the "so that" clause imposes any sort of *de minimis* limitation on Section 8 (Maj. Op. at 24–27). The decision cites *TRW* and other cases that construe the clause to be satisfied if price-fixing or other *per se* arrangements among the competing interlocked firms would be illegal. (*Id.* at 26–27.) However, at the time Section 8 was enacted, the Supreme Court had not yet adopted at least some of the strict *per se* rules that the majority invokes in its interpretation of the "so that" clause. (*Id.* at 25–26.) Moreover, the majority's reliance on the *per se* rule against price fixing is arguably not consistent with the express terms of the "so that" clause, since such agreements do not result in the "elimination" of all competition between the conspirators, but only price [22] competition.[57]

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[53] *Id.* at 587.

[54] *Id.* at 588.

[55] *Id.* at 589.

[56] *Id.* at 588.

[57] One further indication of the inappropriateness of the majority's construction of the "so that" clause is the vertical character of the very *per se* rule of illegality that this same Commission majority recently applied in its *Russell Stover* decision. The majority restated its view in that case that a manufacturer's setting of prices for resale of its goods by distributors was a *per se* offense under the antitrust laws. The same majority's construction of Section 8 in this case would seem to make "competitors" of a manufacturer and a distributor whose contract of sale contains resale price maintenance provisions, because (to paraphrase the "so that" clause) "the elimination of [intrabrand price] competition by agreement among them would violate [one] of the provisions of the antitrust laws." *See Russell Stover Candies, Inc.*, 3 Trade Reg. Rep. (CCH) ¶21,933 (July 1, 1982) at p. 22,370 [100 F.T.C. 1], *appeal docketed, Russell Stover Candies, Inc. v. FTC*, Civil No. 82–2036 (8th Cir., argued April 11, 1983).

It is interesting to note that President Wilson actually urged that director interlocks between firms in buyer-seller relationships be prohibited. *See* H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914). However, the legislative history and subsequent case law clearly indicates that Section 8 was intended to reach only horizontal interlocks. *See, e.g., Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*, 1966 Trade Cas. (CCH) ¶71,678 at p. 82,064 (S.D.N.Y. 1966) ("Only horizontal relationships are covered"); *BankAmerica Corp. v. U.S.*, 51 U.S.L.W. 4685

(footnote cont'd)

Further, the majority and Commissioner Bailey are both incorrect in asserting that any agreement between any two or more competitors that fixes a price will inevitably violate the antitrust laws, thus satisfying the "so that" clause. (Maj.Op. at 26; Bailey Op. at 12.) The Supreme Court has made clear that, in some joint ventures and certain other situations in which competitors combine to produce a different product that individual competitors cannot market effectively, a horizontal agreement setting a price may not be a "naked" restraint of trade lacking any purpose except the stifling of competition.[58] The Court has explained that such conduct may be ancillary to a practice **[23]** having redeeming competitive virtues and, in such cases, competitors' price-related agreements will be lawful under the rule of reason if, on balance, they do not restrain trade unreasonably.[59]

Thus, upon close inspection, the court decisions that have addressed Section 8 of the Clayton Act do not inevitably require imposing strict *per se* liability in this case. Although one line of case law would *permit* strict *per se* condemnation of interlocks between competing corporations, nothing in those cases *prohibits* the Commission from considering competitive effects in Section 8 cases. Moreover, a second line of cases supports the better-reasoned approach—embodied in *Paramount*—that treats likely competitive effects as an important issue under Section 8.[60] As I discuss next, sound antitrust policy dictates that the Commission has a responsibility to follow the second, more legally and economically sound approach.

(U.S. June 8, 1983) at 4687 ("competing corporations" paragraph of §8 "does not bar . . . any kind of vertical interlock"). Thus, in the vertical as well as the horizontal area, Congress was willing to depart from President Wilson's doctrinaire position to achieve a more sensible policy result. *See* Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective,* 21 Vill. L. Rev. 393, 398 (1975–76) ("the legislation which emerged from Congress was more limited in scope than [Wilson] had envisioned. Section 8 of the Clayton Act only covered director interlocks between competitors, and thus fell far short of the objective President Wilson had in mind").

[58] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangments are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

[59] *Id.* at 8–10, 19–24 (agreement among competing members of composers' association to grant non-exclusive blanket license to copyrighted musical compositions at fees negotiated between association and buyer-television network not "naked" restraint, but must be judged under rule of reason), *complaint dismissed on remand, CBS v. ASCAP,* 620 F.2d 930 (2d Cir. 1980) (blanket license held lawful under rule of reason), *cert. denied,* 450 U.S. 970 (1981), *reh'g denied,* 450 U.S. 1050 (1981).

[60] Commissioner Bailey's assertion that the Commission majority, in adopting a rule of strict *per se* liability, is simply following the holdings of "virtually all decided cases" (Bailey Op. at 17.) is not supportable. As explained in the text, only five court cases have ever construed the meaning of the "so that" clause as it applies to the instant matter. Of those, only *TRW* concluded there was no *de minimis* exception to the *per se* standard, while *Sears* and *Paramount* recognized such an exception. As noted above, the parties had stipulated the *de minimis* issue out of the case in *Crocker,* and the Ninth Circuit's decision was recently reversed by the Supreme Court in *BankAmerica.* Moreover, not only did the *Protectoseal* court not reach the *de minimis* question, its conclusion that no market-wide analysis of competition is necessary was apparently based upon a misreading of the language of the "so that" clause, as explained above. Thus, while two cases support the dissent's position, only one case directly supports the majority's approach.

D. *A Strict Per Se Rule Under Section 8 Is Unsound Antitrust Policy*

To say that Section 8 should not be construed as a strict *per se* statute is not to argue that establishing a Section 8 violation requires proof that a merger of the interlocked firms would be unlawful under Section 7 of the Clayton Act. That argument [24] has been expressly rejected by at least two courts.[61] Moreover, in other cases in which both Section 7 and Section 8 violations were alleged, the courts have analyzed the two provisions separately.[62] I agree that had Congress intended an *identical* legal standard to be used for Sections 7 and 8, presumably it would have used identical wording in each section. It did not. However, it does not follow from this that Congress intended a strict *per se* standard under Section 8 that would preclude *any* consideration of competitive effects. To say that Congress intended that no full-blown rule of reason or Section 7 analysis be required in Section 8 cases does not lead inescapably to a rule of *per se* illegality whenever competitors share a director. Thus, I do not urge that a full rule of reason analysis is required to find a Section 8 violation. Rather, I argue simply that before an interlock between competitors is condemned, some abbreviated form of analysis sufficient to determine that the likely competitive effect of the interlock is not *de minimis* should be conducted.

Throughout its historical evolution, antitrust case law has developed varying legal standards. Viewed from one perspective, these might be thought of as falling along a continuum that includes standards ranging from *per se* illegality;[63] to *per se* illegality once certain factual predicates are proven;[64] to the truncated or so-called "quick look" [25] rule of reason that considers whether any possible procompetitive justifications might exist and, if not, condemns the generally anticompetitive practice;[65] to the full-blown rule of reason, which

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[61] *Protectoseal Co. v. Barancik*, 484 F.2d 585, 588–89 (7th Cir. 1973); *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 616–20 (S.D.N.Y. 1953).

[62] *See, e.g., Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978); *American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 573 (E.D. Pa. 1977); *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Oh. 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975).

[63] *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (agreement among competing beer wholesalers to fix credit terms by requiring retailers to pay in advance or upon delivery conclusively presumed *per se* illegal price fixing; further examination under rule of reason unnecessary).

[64] *See, e.g., Fortner Enterprises, Inc. v. United Steel Corp.*, 394 U.S. 495, 498–500 (1969) (*"Fortner I"*); and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608–14 (1953) (*per se* rule against tie-ins applied only where one product is tied to a second, seller has sufficient economic power in tying product market, and not insubstantial amount of commerce in tied product market is involved). *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781–83, 786 n.16 (1975) ("naked" agreement among competing members of state bar association to adhere to minimum-fee schedule for residential real estate title searches found to be "classic illustration" of price fixing, though *per se* label not expressly invoked; in finding effect on prices "plain" and "unusually damaging", Court considered level of adherence to, and enforcement of, challenged agreement, and cited apparent anticompetitive purpose).

[65] *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (agreement among competing members of engineers' society to abide by ethics rule prohibiting discussion of prices with potential

(footnote cont'd)

considers all possible pro- and anticompetitive justifications and effects of the challenged practices;[66] and finally even to the "*per se* legality" that is judicially conferred in extraordinary cases.[67] Thus, even if one were to accept the majority's conclusion that "a *detailed* examination of size of industries, size of corporations, percentage of sales, or volumes of commerce is not properly a part of an adjudicative case under Section 8" (Maj.Op. at 23 n.23, emphasis added.), antitrust precedent furnishes ample flexibility for the abbreviated competitive analysis—short of [26] the full rule of reason standard—that I would adopt under Section 8.

Even assuming the majority today chooses to apply a rule of strict *per se* illegality as a matter of antitrust policy, rather than because it feels required to do so, its actions do not meet the requisite standard for applying a *per se* rule. That test was recently reiterated by the Supreme Court in the 1979 *Broadcast Music* case:

> More generally, in characterizing [the challenged] conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would *always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."* (Emphasis added, citation omitted.)[68]

Measured against this standard, the majority's conclusion as to the *per se* illegality of director interlocks between competing firms regardless of the *de minimis* competitive impact the interlock might involve

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customers until after initial selection of engineer, while not price fixing as such, requires no elaborate industry analysis to demonstrate anticompetitive character; agreement held unlawful after extensive discussion—and rejection—of proffered "public safety" defense under rule of reason). *But cf. Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (describing agreement challenged in *Professional Engineers* as "unlawful without requiring further inquiry").

[66] *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (agreement among competing members of composers' association to grant nonexclusive blanket license to copyrighted musical compositions at fees negotiated between association and buyer-television network not "naked" restraint lacking any purpose except stifling competition, thus *per se* rule not invoked; citing factors including integration of various services within blanket licensing system—resulting in "substantial lowering of costs"—Court remands for "a more discriminating examination under the rule of reason"), *complaint dismissed on remand, CBS v. ASCAP*, 620 F.2d 930, 935–36 (2d Cir. 1980) (court finds blanket license lawful under rule of reason, citing customers' election to use such licenses "in preference to realistically available marketing alternatives", copyright owners' "unimpaired independence to set up competitive prices for *individual* licenses" and risk-free availability of blanket license renewal should individual negotiations fail), *cert. denied, CBS v. ASCAP*, 450 U.S. 970 (1981), *reh'g denied*, 450 U.S. 1050 (1981).

[67] *See Flood v. Kuhn*, 407 U.S. 258 (1972) (professional baseball held not intended by Congress to be included as "trade or commerce" within meaning of Sherman Act; agreements among baseball clubs to adopt uniform player contract embodying "reserve system" therefore exempt from Act's coverage).

[68] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979), *citing United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 441 n.16 (1978). *See also* notes 58 and 66 above. *See also Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) ("there are certain agreements which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

can only be viewed as an aberration from the Supreme Court's own approach. There simply is no basis in antitrust policy for the majority's strict *per se* rule.[69] [27]

Perhaps the potential dangers created by the majority's unnecessary ruling today will be limited to some extent by the relative infrequency of Section 8 challenges.[70] However, the majority's holding that Section 8 is a strict *per se* statute that admits of no form of *de minimis* exception—coupled with its expansion of the definition of interlocked corporations to include foreign parents of interlocked domestic firms —may well encourage the filing of more such actions. To the extent such lawsuits attack procompetitive or competitively neutral interlocks, today's decision may well harm competition more than it promotes it.

In its recent *Ethyl* decision [101 F.T.C. 425], the same Commission majority asserted that the new antitrust cause of action created in that case could be invoked only by the Commission itself under Section 5 of the FTC Act, and was thus not susceptible of misuse by private [28] litigants.[71] The same cannot be said of the majority's

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[69] *See, e.g.*, Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 Antitrust L.J. 317, 329 (1976) (62 years of Section 8 enforcement "has produced no hard evidence of an actual trade restraint", and comprehensive FTC study and numerous Congressional hearings "have likewise turned up no actual abuses caused by director interlocks"; to the contrary, "all interlocks are not inherently evil," and "Many interlocks—especially those involving directors with a financial background—may provide more benefits than risks of abuse"); Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective*, 21 Vill. L. Rev. 393, 393–94 (1975–76) ("corporate interlocks and their effects on competition are perhaps the least understood relationships in the history of antitrust law enforcement", and "efforts to understand the actual effects of these [interlock] relationships and their impact, if any, on competition have been largely unsuccessful"); Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 834 (1968) ("very little is known about the actual effects of interlocks"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 154–55 (1979) ("interlocks are not necessarily inherently evil", and "no study has ever produced concrete evidence that interlocks actually have resulted in anticompetitive abuses"); Staff of Antitrust Subcomm. of House Comm. on the Judiciary, 89th Cong., 1st Sess., Interlocks In Corporate Management 6 (Comm. Print 1965) ("as of this time, there are virtually no factual analyses of how interlocking business organizations deal with particular transactions and the social and economic impact of such transactions"). *See also* Clanton Statement at 1 ("Because of these [significant] changes [in the corporate world since 1914] it has been argued that an overly strict application of Section 8 may limit the pool of qualified directors without any compensating benefits to competition, since it is unlikely that directors of multibillion dollar corporations are involved in routine business decisions where only a few million dollars of competitive overlap are involved").

Commissioner Bailey's concurrence refers to a 1978 congressional staff study that purportedly details the potential adverse effects of interlocks in general. (Bailey Op. at 15.) However, most of the effects hypothesized in the quoted paragraph have nothing to do with competition. Moreover, the staff report concedes that "there has been no effort to look at the broad array of interlocks as they may affect one or more industries or markets, or the Nation's economy in general." Interlocking Directorates Among the Major U.S. Corporations, 95th Cong., 2d Sess. 10–11 (Comm. Print 1978). Further, not only does the 1978 staff report fail to cite a single study finding actual anticompetitive effects resulting from competitor interlocks, but it expressly disclaims reaching any such conclusions itself, stating:

> *This report does not make any allegations as to the predatory use of specific interlocks for . . . anticompetitive purposes.* (*Id.* at 27, emphasis added.)

[70] *See, e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 630 (1953) (39 years following Clayton Act's passage until Supreme Court decides first of its two §8 cases); *Protectoseal Co. v. Barancik*, 484 F.2d 585, 586–87 (7th Cir. 1973) (7th Circuit considers its first Section 8 case 59 years after Clayton Act enacted).

[71] *Ethyl Corp. et al.*, 3 Trade Reg. Rep. (CCH) ¶22,003 (Mar. 22, 1983) at p. 22,560, [101 F.T.C. 425] *appeals docketed*, No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983). *But see id.*, Miller, Chairman, dissenting at p. 22,566 (noting danger that private litigants would attempt to graft unilateral "facilitating practices" theory onto Sherman Act via tacit collusion or conspiracy theories).

action today. While I generally agree with Commissioner Clanton's suggestion that one means by which the Commission could seek to avoid the policy concerns raised by a Section 8 strict *per se* rule is through the adoption of a *de minimis* exception in prosecutorial guidelines (Clanton Statement at 2.), no such constraint would apply to private litigants bringing Section 8 actions.[72] When competitive effects are made virtually irrelevant in Section 8 cases—as they will be if the rule adopted by the Commission's decision is followed by the appellate courts—there is no check to assure that prosecution of private actions will promote the public interest. This factor assumes added importance when one considers that private Section 8 lawsuits are often initiated for purposes having no relation to any alleged injury to competition.[73] Perhaps the clearest illustration of such misuse of Section 8 is the lawsuit brought as part of a struggle for control over the board of directors of Paramount [29] Pictures in the mid-1960's. Following the breakdown of a compromise entered to avoid a proxy fight, the plaintiff corporation brought suit pursuant to Sections 7 and 8 of the Clayton Act to secure removal of two dissident shareholder-directors. As the district court stated in that case:

> The purpose of this suit was not to protect the plaintiff or the public against a violation of the Clayton Act, but rather to serve the interest of the majority of Paramount's board of directors in securing the removal of the two dissident directors.[74]

Presumably, the majority's answer to this potential for private mischief is that Congress weighed that possibility and assumed the risk when it determined in 1914 to make Section 8 a *per se* statute, and it "has declined thus far to alter the *per se* rule for finding a violation under Section 8." (*See* Maj. Op. at 25.) As the above discussion of legislative history makes clear, however, this argument lacks sufficient merit to justify the imprudent antitrust policy established today.

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[72] *See BankAmerica Corp. v. United States*, 51 U.S.L.W. 4685 (U.S. June 8, 1983) at 4688 (rejecting Government's argument that expanding Section 8 scope to prohibit bank-nonbank interlocks would not upset business world's longstanding reliance on earlier, narrower interpretation of Section 8 because of Government's intent to grant "amnesty" to directors who resign within reasonable time; Court notes "such persons face possible civil liability . . . against which the Government cannot . . . render them immune").

[73] *See, e.g., American Bakeries Co. v. Gourmet Bakers, Inc.*, 515 F.Supp. 977, 979 (D. Md. 1981) (as part of hostile proxy contest, Clayton Section 8 action brought against insurgent candidate for directorship in plaintiff company); *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1197–98 (2d Cir. 1978) (as part of proxy fight, plaintiff firm brought Clayton Sections 7 and 8 and securities suit to prevent defendant firm—having acquired minority shareholder interest in plaintiff—from electing directors to plaintiff's board and compelling plaintiff to sell unrelated, recently-acquired business); *American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 573, 577–78 (E.D. Pa. 1977) (plaintiff firm brought suit under Clayton Section 8, other antitrust laws, and securities laws, to enjoin hostile tender offer by defendant corporation); *In Re Penn Central Securities Litigation*, 367 F.Supp. 1158, 1162–66 (E.D. Pa. 1973) (plaintiff minority shareholders brought class action and stockholders derivative suit under securities and antitrust laws—including Section 8—against numerous related firms, their directors, and others, to halt defendant parent corporation's alleged allocation of territories and markets among its subsidiaries).

[74] *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.*, 1966 Trade Cas. (CCH) ¶71,678 at p. 82,066 (S.D.N.Y. 1966).

Section 8 will only be a strict *per se* statute if the Commission and the courts interpret it as such. Congress did not make it so, and the relevant case law is divided. Since a strict *per se* interpretation is inconsistent with sound antitrust policy[75] (I do not understand the majority to argue otherwise), I believe the Commission should opt for the more flexible view. Under that preferred approach, adjudicators may and should—in some fashion—consider the degree of competitive overlap and the likely threat to competition before condemning a director interlock under the imprecise prohibitions of [30] Section 8 of the Clayton Act.[76]

II. THE FORMER HORIZONTAL OVERLAP BETWEEN BORG-WARNER AND BOSCH APPEARS TO HAVE BEEN MINIMAL

One of the most important facts to consider in assessing the majority's conclusions in this specific matter is that the competitive overlap at issue no longer exists. No direct overlap ever existed between Borg-Warner and Bosch GmbH. The only overlap was between the latter's domestic subsidiary, Bosch U.S., and Borg-Warner. However, in July 1981—almost two years ago—Borg-Warner sold all of its automotive aftermarket operations to The Echlin Manufacturing Company.[77] Since Borg-Warner's withdrawal from the relevant product lines occurred over a year after the initial decision in this matter, the ALJ's conclusions concerning liability and the need for injunctive relief did not consider this important fact. (It should also be noted that not even Bosch U.S. continues to sell the relevant product lines; shortly before completion of trial in this matter production of those parts was taken

[75] As indicated above, the majority's strict *per se* prohibition of interlocks may actually restrain beneficial competition by disregarding potentially procompetitive reasons for employing director interlocks. Thus, the majority's approach may impair the efficiency of corporations in various ways, including: reducing the number of qualified director candidates, especially in fields where there is a shortage of qualified experts; prohibiting smaller corporations from taking advantage of expertise that may be more readily available to their larger competitors; increasing the difficulty confronting firms required by state law to be incorporated in a state to conduct business there; and making it more difficult to enter new industries in which an incumbent firm shares a director with the prospective entrant.

[76] As the majority concedes (Maj. Op. at 24 n.25.), this position also finds support among the commentators. *See, e.g.*, Wilson, *Unlocking the Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act*, 45 Antitrust L.J. 317, 324 (1976) (noting "Throughout antitrust, courts have recognized a general concept of de minimis," and citing *Paramount Pictures* as "the leading opinion on the applicability of the general de minimis concept" to Section 8); Halverson, *Should Interlocking Director Relationships Be Subject to Regulation And, If So, What Kind?*, 45 Antitrust L.J. 341, 350 (1976) (citing *Paramount Pictures*, recommends adoption of a policy "pursuant to which antitrust officials would seek to dissolve only those interlocks which involve companies with a significant competitive overlap"; conversely, "where the competitive overlap is de minimus [sic], the risk of competitive abuse is minute and does not justify the expenditure of the public's funds"); Note, *Interlocking Directorates and Section 8 of the Clayton Act*, 44 Alb. L. Rev. 139, 145–46 (1979) (characterizing Section 8 as a *per se* prohibition only of interlocks satisfying other statutory requirements, including that "the competition must not be *de minimis* [sic]", which "insures that the competitive overlap between the interlocked corporations is significant enough to threaten anticompetitive abuses"). *Cf.* Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 846 (1968) (suggests no *de minimis* exception be recognized, conceding this approach would probably lead courts to hold interlocked firms were not "competitors" where actual overlap is insignificant; concludes: "An explicit de minimis exception has the advantage of permitting the courts a greater degree of candor and is more likely to produce consistent doctrine").

[77] *See The Echlin Mfg. Co., et al.*, Docket No. 9157 (Complaint ¶11) (July 23, 1981).

over by a different subsidiary of Bosch [31] GmbH.[78]

Putting Borg-Warner's withdrawal aside for the moment, whatever possible threat to competition may have arisen from the overlaps thought to have existed at the time the complaint in this matter was issued, it is clear that the extent of those alleged overlaps dwindled considerably over the course of this litigation. The complaint alleges that Borg-Warner and Bosch competed in at least nine specified distinct product lines.[79] At trial, complaint counsel offered no evidence at all as to two of those lines.[80] The ALJ found insufficient evidence on which to base a finding of competition in three other lines.[81] In addition, the majority upholds (correctly, I believe) the ALJ's finding of insufficient evidence to establish the parent-subsidiary control requisite for a Section 8 violation in yet another line.[82] (Maj. Op. at 21 n.22.) The majority holds that "Borg-Warner was a competitor of Bosch U.S. in sales of ignition parts, wire and cable products, and carburetor tune-up kits with application on foreign cars." (*Id.* at 16.) Thus, the majority concedes that it can now identify only a relatively narrow product line grouping in which the two domestic corporate respondents competed prior to Borg-Warner's complete withdrawal from all relevant product lines almost two years ago. (*Id.* at 31.) This fact is important not only for its relevance to the question of the need for injunctive relief (discussed in Part IV below); it would also be relevant to any competitive analysis of the challenged interlock—an analysis the majority refuses to undertake even in cursory fashion. [32]

I do not take issue with the majority's finding that Borg-Warner and Bosch U.S. formerly competed in the manufacture and sale of some segment of automotive replacement parts. (Maj. Op. at 16.) The record here is susceptible of several alternative definitions for the boundaries of that segment. But assuming the majority has identified correctly the product group in which competition formerly existed, there is scant information in the record—as the ALJ concluded (ID 46.)—from which we might attempt to infer the extent of that competitive overlap. The ALJ found that in 1979 Borg-Warner had worldwide sales of approximately $3 billion. (IDF 3, *citing* Tr. 1063–64.) While the majority was unable to find accurate figures in the record, it accepts the ALJ's estimation that in 1978 Borg-Warner made approximately $900,000 in sales in what the majority finds to be the overlapping product line. (Maj. Op. at 5 n.4.) Thus, the best that can

[78] Letter from Joseph A. McManus, Esq., to ALJ von Brand, *ex parte* (Feb. 4, 1980) at 1.

[79] Automotive "ignition parts, wire and cable, carburetors, carburetor kits, automotive test equipment, automotive air conditioner compressors," and certain non-automotive product lines, "such as hydraulic valves, hydraulic gear pumps and motors." (Complaint ¶ 12) (Nov. 7, 1978).

[80] Carburetors and automotive test equipment. (ID 2 n.1.)

[81] Hydraulic valves, gear pumps, and motors. (ID 49–52.)

[82] Automotive air conditioning compressors. (ID 52.)

be said is that Borg-Warner's *1978* overlapping sales were three one-hundredths of one percent of its overall *1979* sales.

With respect to Bosch U.S., the majority finds that 1978 sales by its automotive aftermarket division were $72 million (*Id.* at 5.), and the ALJ's findings indicate overall 1978 Bosch U.S. corporate sales were approximately $172.54 million. (IDF 47.) Conceding record evidence on the point to be "somewhat sketchy", the majority concludes that the best estimate of Bosch U.S.'s sales in the overlapping product group was $5.4 million (*Id.* at 5–6 and n.6), or 7.5 percent of that one division's 1978 sales and only about 3.1 percent of overall Bosch U.S. corporate sales. As the majority concedes, these $900,000 and $5.4 million sales figures "are relatively small fractions of the total business of these corporations." (Maj. Op. at 31.)

Thus, our best (albeit imperfect) estimate of combined, overlapping sales for 1978 is approximately $6.3 million. Unfortunately, there is no evidence in this record concerning what percentage of the overall U.S. automotive aftermarket in this overlapping "product group" this estimated $6.3 million in combined sales accounts for. It might be one-tenth of one percent, 10 percent, or 50 percent. The majority simply doesn't care which is the case. Because two competing firms with an infinitesimal [33] combined market share could theoretically enter a (hopelessly futile) *per se* unlawful agreement to fix prices or divide markets, the majority believes Section 8 requires condemnation of this challenged interlock arrangement. (*See Id.* at 26.)

However, even setting aside the majority's incorrect conclusions concerning the legislative history of Section 8, there remain—as Commissioner Clanton concedes—"important policy concerns about condemning technical, inadvertent or trivial violations of Section 8." (Clanton Statement at 1.) In my judgment, the Commission should ascertain whether the former director interlock between firms with $6.3 million in overlapping sales falls into the category of "trivial" or *de minimis* matters.[83] Although the majority asserts that the $6.3 million figure is "clearly not *de minimis*" (Maj.Op. at 23 n.23), I do not find that conclusion so obvious, especially when the more appropriate focus upon competitive significance (rather than dollar amounts) is considered. The ALJ described the record before us as "narrowly based", and concluded that it "does not permit an evaluation of the competitive effects of the [challenged interlock] arrangements." (ID 58.) Because the present record affords insufficient evidence to assess

[83] *Cf. Protectoseal Co. v. Barancik*, 484 F.2d 585, 587 (7th Cir. 1973) (plaintiff alleged combined market shares of competing, interlocked firms exceeded 50 percent of competing product line alleged in complaint); *United States v. Crocker National Corp.*, 656 F.2d 428, 433 (9th Cir. 1981) (parties stipulated that three defendant banks—among largest in U.S.—had outstanding real estate loans of $6.5 billion and competed with and shared directors with four of largest insurance companies having $32 billion in such loans outstanding), *rev'd on other grounds sub nom., BankAmerica Corp. v. United States*, 51 U.S. 4685 (U.S. June 8, 1983).

whether the challenged interlock created a danger to competition between either the interlocked firms, or among all firms in the industry, I would remand to the ALJ to receive evidence and make findings on these critical issues.

III. THE SALE OF THE OVERLAPPING ASSETS—COMBINED WITH THE RESIGNATION OF THE INTERLOCKED DIRECTORS—APPEARS TO MOOT THIS PROCEEDING

I agree with the majority that the resignation of the individual respondents Merkle and Bacher following issuance of the Commission's complaint, in and of itself, does not, [34] as a legal matter, automatically moot this case. (Maj. Op. at 29–30.) The Supreme Court so held in *United States v. W. T. Grant Company.*[84] However, as one district court explained in dismissing a Section 8 case for mootness on this basis, "it is within the discretion of [the adjudicator] to determine that under all the circumstances it does [moot the Section 8 claims]."[85] In *W.T. Grant* the Supreme Court elaborated further that even where director resignations do not moot the proceedings,

> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one.[86]

Respondent Bacher's death has removed the possibility that any Section 8 violation will recur with respect to him. However, this leaves the question of whether Borg-Warner's post-complaint sale of its automotive parts division to Echlin—taken together with the resignation of respondent Merkle—removes any "reasonable expectation that the wrong will be repeated," at least as to Borg-Warner.

In two Section 8 cases, the resignation of the interlocked directors, together with the post-complaint sale or discontinuance of the overlapping product line by one of the interlocked firms, has been held to moot the Section 8 suit. In *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.,*[87] the district court found that the post-complaint sale of stock in one of the interlocked corporations, coupled with the [35] resignation of one of the two interlocked directors, "has

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[84] 345 U.S. 629, 630–32 (1953). *See also Kraftco Corp., et al.,* 89 F.T.C. 46, 65–66 (1977), *remanded as to relief sub nom., SCM Corp. v. FTC,* 565 F.2d 807 (2d Cir. 1977), *identical order reissued on remand, Kraftco Corp., et al.,* 92 F.T.C. 416, 419 (1978), *aff'd sub nom., SCM Corp. v. FTC,* 612 F.2d 707 (2d Cir.), *cert. denied,* 449 U.S. 821 (1980); *United States v. Newmont Mining Corp.,* 34 F.R.D. 504, 505 (S.D.N.Y. 1964).

[85] *In Re Penn Central Securities Litigation,* 367 F.Supp. 1158, 1168 (E.D. Pa. 1973), *citing United States v. W.T. Grant Co.,* 345 U.S. 629 (1953) (resignation of four interlocking directors, coupled with finding of no Sherman Act Section 1 violation, held to render Section 8 claims moot); *cf. United States v. Newmont Mining Corp.,* 34 F.R.D. 504, 507–08 (S.D.N.Y. 1964) (on facts of case—including multiple alleged interlocks—director resignations did not entitle defendants to *summary judgment* on mootness issue).

[86] 345 U.S. at 633, *citing United States v. Aluminum Co. of America,* 148 F.2d 416, 448 (2d Cir. 1945).

[87] 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966).

rendered moot any claim of violation of §8."[88] Similarly, in *United States v. Cleveland Trust Company,*[89] the district court granted a motion by a corporate defendant (Pneumo-Dynamics Corporation) to dismiss a Section 8 claim on the ground that the post-complaint sale of its assets in the relevant product market had rendered the Section 8 case moot *as to that defendant.* Following a discussion of *Paramount* the court stated:

> Pneumo has effectively divested itself of all interests in the machine tool industry, and does not retain the necessary facilities to resume such operations in the future. *It is no longer possible, therefore, for Pneumo to eliminate competition in that industry by means of an agreement with [the other interlocked corporate defendants]* resulting in a violation of any of the provisions of the antitrust laws. *At best, it is conjectural whether Pneumo will ever be able to do this at some future date.* This aspect of the Government's section 8 case, accordingly, has become moot. (Emphasis added)[90]

As indicated, the court did not dismiss the Section 8 case as moot as to the other corporate defendants. Nevertheless, this precedent appears to support a legal conclusion that this proceeding is now moot with respect to Borg-Warner.

As in *Paramount* and *Cleveland Trust,* Borg-Warner no longer manufactures the product line in which the challenged overlap existed. Its "divestiture" of its auto parts division might in normal circumstances be sufficient under *Paramount* and *Cleveland Trust* to moot any competition concerns that might have resulted from a director interlock. But here there is an additional wrinkle: the Commission challenged that sale on antitrust grounds, and issued a complaint against not only the acquiring firm (Echlin), but the seller—Borg-Warner—as well.[91] The majority raises the specter that, should the sale to Echlin ultimately be found unlawful, it is possible that the relief ordered may [36] involve Borg-Warner's reacquisition of its former auto parts unit. (Maj. Op. at 33–34.)

I view the probability of a Commission order having that effect to be, in the words of *Cleveland Trust,* conjectural at best. (In so concluding, of course, I express no view whatever on the merits in the *Echlin* matter or on the form of relief that might be appropriate should liability be found there.) Borg-Warner will only reacquire its former auto parts division *if* the Commission finds the sale challenged in the *Echlin* matter to be unlawful and *if* it orders or approves the reacquisition. If the competitive danger was *de minimis* or non-existent, then the danger the interlock might recur as a result of relief the Commission might impose if it finds liability in the *Echlin* matter would seem

[88] *Id.* at p. 82,060.

[89] 392 F.Supp. 699 (N.D. Oh. 1974).

[90] *Id.* at 709–10.

[91] *Echlin Mfg. Co., et al.,* Docket No. 9157 (July 23, 1981).

inconsequential. However, as noted above, the record affords the Commission no basis on which to determine whether the competitive effect of the former interlock was anything more than *de minimis.*

Thus, I am inclined to conclude that, at least as to respondent Borg-Warner, the possibility of the challenged overlap recurring is so remote and speculative that it fails to meet the legal standard that the majority recognizes (Maj. Op. at 29–30, 34.): that there is no "cognizable danger" that the challenged interlock (or any other interlock in this market between these two respondents) will recur. I would include this possible mootness among those issues that I believe should be remanded to the ALJ. However, regardless of whether the above factors are sufficient to dictate a legal conclusion of mootness as to Borg-Warner, as the following section explains they may well be adequate to remove any necessity for issuance of injunctive relief against any of the respondents.

IV. ISSUANCE OF AN ORDER APPEARS UNNECESSARY ON THE FACTS IN THIS RECORD

As is clear from Commissioner Clanton's concurring statement, even assuming a Clayton Act violation and a lack of mootness, the case for issuing an order here is less than overwhelming. Commissioner Clanton finds it a "close call", citing the relatively small dollar overlap between Borg-Warner and Bosch, and Borg Warner's sale of its auto parts division to Echlin. (Clanton Statement at 1.) While respondents' apparent lack of [37] any systematic screening program tips the balance toward the need for an order in Commissioner Clanton's mind (*Id.*), I believe the other factors discussed above are probably sufficient to negate any public interest in issuance of the order promulgated by the majority today. Thus, even were there a sufficient basis to find Borg-Warner, Bosch, and the individual respondents liable on this sparse record, I doubt it is necessary to issue an order against any of the respondents.[92]

Clearly, under Section 8 (as under other regulatory laws), "there is no *per se* rule requiring the issuance of an injunction upon the showing of a past violation."[93] As the Second Circuit stated, "it is for the FTC to weigh these considerations [relevant to the likelihood of a recurrent violation]."[94] Indeed, the first of only two Supreme Court decisions ever to consider Section 8 liability—*United States v. W. T. Grant Co.*—affirmed a district court's refusal to award injunctive

[92] *Cf. Ethyl Corp., et al.,* 3 Trade Reg. Rep. (CCH) ¶22,003 at 22,553–58 (Mar. 22, 1983) (though all four respondents found liable under §5, Commission order covers only two), *appeals docketed,* No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983).

[93] *SCM Corp. v. FTC,* 565 F.2d 807, 813 n.18 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980), *quoting SEC v. Bausch & Lomb, Inc.,* 565 F.2d 8, 18 (2d Cir. 1977).

[94] 565 F.2d at 813 n.18.

relief, despite its finding of Section 8 violations that were not mooted by the interlocked director's resignation.[95] This result came even though the defendant director had been found liable for three separate interlocks involving six corporations upon whose boards he sat.[96] In reaching this result, the Supreme Court held that the party moving for injunctive relief

> . . . must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the [38] effectiveness of the discontinuance and, in some cases, the character of the past violations.[97]

As the Second Circuit recently instructed the Commission in *SCM Corporation v. FTC,* the burden is on *complaint counsel* to show injunctive relief is necessary, *not* on respondent to show it is unnecessary.[98] I am not satisfied that this record makes the requisite showing. The sale of Borg-Warner's auto parts unit, coupled with the resignation of Messrs. Merkle and Bacher and the latter's subsequent death, are, in my judgment, persuasive evidence of "the effectiveness of the discontinuance" of the challenged interlock. Several Section 8 cases on this very issue lend strong support to this conclusion. Thus, even assuming Section 8 liability and a lack of mootness, several courts have relied upon some combination of director resignation and sale of the overlapping assets as a sufficient basis for invoking judicial discretion to deny injunctive relief.[99]

Two courts of appeals have recently clarified that this is not simply another argument that the case should be dismissed for mootness. As the Second Circuit explained in *SCM:* [39]

> [M]ootness and denying a request for injunctive relief . . . are analytically distinguishable [concepts] and a court could find that a case is not moot and yet deny injunctive relief.[100]

The Ninth Circuit also addressed this point in *TRW:*

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[95] *United States v. W. T. Grant Co.,* 345 U.S. 629, 633–36 (1953).

[96] *Id.* at 630, 633–34.

[97] *Id.* at 633.

[98] *SCM Corp. v. FTC,* 565 F.2d 807, 812–13 (2d. Cir. 1977), *cert. denied,* 449 U.S. 821 (1980).

[99] *See, e.g., TRW, Inc. v. FTC,* 647 F.2d 942, 954 (9th Cir. 1981) (although case not moot, court cites factors including non-blatant nature of Section 8 violation and discontinuance of directorship before FTC investigation in holding Commission erred in issuing cease and desist orders against corporate respondent and interlocked former director); *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., Inc.,* 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966) (assuming, arguendo, Section 8 violation had occurred, in exercise of discretion court declines to issue order against defendants, citing sale of overlapped assets and resignation of interlocked directors in concluding plaintiff failed to show "cognizable danger of recurrent violation"); *see also SCM Corp. v. FTC,* 565 F.2d 807 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980) (finding Commission used incorrect legal standard in deciding interlocked director's post-complaint resignation did not make injunctive relief unnecessary).

[100] *SCM Corp. v. FTC,* 565 F.2d 807, 812 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980), *citing United States v. Newmont Mining Corp.,* 34 F.R.D. 504 (S.D.N.Y. 1964).

The difference between the standard governing mootness and that regarding the need for prospective relief thus is one between a "mere possibility" and a "cognizable danger" of recurrent violation. More significantly, the Commission complaint counsel bears the burden of showing the need for injunctive relief while the burden of proving mootness rests on the respondent.[101]

Moreover, this same Commission majority exercised this identical discretionary authority in its recent *Ethyl* decision.[102]

Even if one were to accept (which I do not) the majority's proposition that its strict *per se* construction of Section 8 was either intended by Congress or mandated by the language of the statute, that respondents have violated that strict *per se* rule, and that it is irrelevant whether the extent and nature of the competitive overlap was *de minimis,* I would still oppose issuance of an order on this record as it now stands. The majority has, in essence, ruled evidence of the existence or extent of pro- or anticompetitive effects irrelevant as to Section 8 liability. However, I do not interpret this holding to mean that such evidence cannot be considered on the appropriateness and necessity of injunctive relief. Given the other factors discussed above that militate against issuance of an order here, it is unfortunate that the record is silent on the one issue that might tip the balance clearly in one direction or the other. [40]

We simply do not know what the competitive effect of the challenged interlock was, how any such effect would be mitigated by the sale of the overlapping product line, or what the effect of the majority's order is likely to be. Hence, I believe we should remand this matter to the ALJ to receive this and other evidence relating to the necessity of injunctive relief. If such evidence shows a danger of a recurring interlock that may pose a threat to competition, an order could then issue. If, however, such additional evidence disclosed no danger of recurrence, or that any such danger would likely have either a trivial or non-existent anticompetitive impact, then I believe no order should issue. Given the harsh rule of liability adopted today and its uncertain ramifications, I believe such a course would be prudent and appropriate here, especially in light of the Commission's important enforcement responsibilities and its duty to assure that its actions are consistent with the public interest.

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[101] 647 F.2d 942, 954 (9th Cir. 1981), *citing SCM Corp. v. FTC,* 565 F.2d 807, 812–13 (2d Cir. 1977), *cert. denied,* 449 U.S. 821 (1980).

[102] *See Ethyl Corp., et al.,* 3 Trade Reg. Rep. (CCH) ¶22,003 (Mar. 22, 1983) at p. 22,557–58 (imminent and complete withdrawal of one respondent from four-firm industry held not to moot proceeding as to it; withdrawing firm found liable, but not subject to final order entered against two of four respondents) [101 F.T.C. 425], *appeals docketed,* No. 83–4102 (duPont) (2d Cir. May 25, 1983) and No. 83–4106 (Ethyl) (2d Cir. May 27, 1983).

V. CONCLUSION

The majority has adopted an unnecessarily harsh construction of Clayton Act Section 8 to condemn an indirect director interlock that no longer exists, that very probably can only recur if the Commission requires or permits it, and that—on the basis of this meager record—appears trivial in scope. The majority has done so without any consideration of whether either the challenged interlock or the remedy imposed will help or harm competition. This decision perpetuates an improvident standard of liability under Section 8, notwithstanding that the language of the statute, its legislative history, the relevant judicial precedent, and the facts of this particular case all furnish ample room to reach a contrary result that would promote sound antitrust policy.

It appears that, for a majority of this Commission, *de minimis curat lex.*

SEPARATE STATEMENT OF COMMISSIONER CLANTON

While I concur in the Commission's decision, I would like to offer some additional comments on the *de minimis* issue.

The fundamental difficulty with applying Section 8 of the Clayton Act in a rote *per se* fashion is that the corporate world has changed significantly since 1914. The $1 million statutory threshold today encompasses the activities of thousands of small businesses, firms that presumably were not subject to the Act at the time it was passed. In addition, a substantial and increasing number of major corporations are conglomerates or are, by necessity, widely diversified. Because of these changes, it has been argued that an overly strict application of Section 8 may limit the pool of qualified directors without any compensating benefits to competition, since it is unlikely that directors of multibillion dollar corporations are involved in routine business decisions where only a few million dollars of competitive overlap are involved. For these reasons, among others, it is urged that a *de minimis* exception should be recognized in Section 8.

The Commission's opinion ably discusses the relevant legal precedent on this subject and, I believe, correctly concludes that, as a matter of law, there is no dollar floor, other than the statutory minimum of $1 million, below which liability will not attach. Nevertheless, the dissent raises important policy concerns about condemning technical, inadvertent or trivial violations of Section 8 because of the *per se* operation of the statute and the necessity for an order in the instant case.

It is a close call whether an order should issue in this case because

of the relatively small dollar overlap and Borg Warner's sale of its Automotive Parts Division to Echlin Manufacturing Corporation. My principal reason for supporting a limited order is the apparent lack of any systematic screening program for identifying future interlocks, thus leaving the potential for violations to recur. While in some circumstances a more appropriate remedy might be to simply require respondents to set up an effective compliance program, the modest prohibition on interlocks in the automotive parts business embodied in this order seems appropriate given the history of this case. This approach is also consistent with the direction of the courts—to closely scrutinize the scope of relief in interlock cases in order to temper the potentially harsh effects of a *per se* application of the statute. *See, e.g., TRW, Inc.* v. *F.T.C.*, 647 F.2d 942 (9th Cir. 1981). [2]

However, while I endorse continued judicial restraint in the selection of appropriate remedies in Section 8 cases, the Commission has the present ability to address the *de minimis* issue in other contexts as well. The $5 million threshold established in this Order, in an effort to mitigate the potential risk of civil penalties for technical violations, represents a responsible *de minimis* standard that should be articulated by the Commission in prosecutorial guidelines. I believe that an enforcement policy of this nature is consistent with the statutory scheme and modern-corporate reality and would go a long way to address many of the valid concerns raised by the dissent. Moreover, in view of the debate about the legislative history of this statute and the substantial changes that have taken place in the corporate world in the last six decades, it may be timely for Congress to revisit this issue to provide enforcement agencies and the business community with its contemporary judgment concerning the import of Section 8.

SEPARATE CONCURRING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

The dissenters in this case argue that antitrust liability under Section 8 of the Clayton Act should require some assessment of the competitive effects of challenged interlocking directorates between competing corporations. Applicable case law has held that Section 8 has *per se* application once the elements set out in the statute have been established. The dissenters have found no case that takes their contrary view, which they argue is more consistent with their understanding of sound antitrust policy. At the very least, the dissenters state, Section 8 admits of a *de minimis* commerce exception to liability, and that the better line of case law on the subject supports such an interpretation. Because the dissenters would apply a different legal standard than the one endorsed in this case, they would dismiss

this proceeding or remand it for some assessment of competitive effects.[1] [2]

I would have had nothing to add to the Commission's decision in this matter but for the fact that the dissenters argue that a competitive effects test is grounded in the legislative history of Section 8, and that the precedents are in error because they turn on a misunderstanding or misreading of that history. On the contrary, the legislative material relied upon by the dissenters constitutes a single shard of the history of this statute, and a fuller consideration of this history provides ample basis for the uniform judicial approach to liability that has been taken by the courts and by the Commission in this case.

Thirty years ago, Judge Weinfeld, in *United States v. Sears, Roebuck & Co.*,[2] laid out what has been termed a "*per se*" approach to Section 8 of the Clayton Act.[3] Section 8 prohibits interlocking directorates among two or more corporations engaged in commerce, any one of which has more than $1 million in capital, surplus, and undivided profits, "if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."[4] Judge Weinfeld in *Sears* reasoned that Section 8 analysis need not determine whether a hypothetical merger between the interlocked corporations would violate the antitrust laws under the rule of reason, because price fixing was also an "elimination of competition" which would be a *per se* antitrust violation if undertaken by the interlocked corporations.[5]

The court in *Sears* observed that the legislative history of Section 8 was "inconclusive" in determining the meaning of the "so that" clause.[6] A thorough reexamination of the legislative history reveals that Congress considered and failed to enact several proposals that would have made the statutory language of Section 8 either more stringent or more like Section 7; that House and Senate Reports noted the breadth of the bill and its design to deal with antitrust violations in their incipiency; that the proposal and rejection of the so-called Cummins amendment was an [3] ambiguous reflection on the intent of Congress; that commentators shortly after the passage of Section 8 noted succinctly the problem of interpreting the "so that" clause;

[1] The dissenters do not explain the evidentiary elements of their competitive effects test for Section 8, except to say that it falls somewhere in between the *per se* and full-blown rule of reason tests that lie at opposite ends of the antitrust scale. Such a conjectural standard would be left presumably to future courts to define, without much guidance from the language of the statute itself.

[2] 111 F.Supp. 614 (S.D.N.Y. 1953).

[3] *See id.* at 620–21.

[4] 15 U.S.C. 19.

[5] *See United States v. Sears, Roebuck & Co.*, 111 F.Supp. at 616–17, 619–21.

[6] *Id.* at 619.

and that investigations and staff reports by subsequent Congresses have reaffirmed the need to check the potential abuses of interlocking directorates. Finally, and most telling, courts confronted by the very questions raised in the dissenting opinion here have examined the whole of the available record on Congressional intentions with respect to Section 8 and applied a strict theory of liability.

A. *Early Bills*

Section 8 was passed in response to concern from several significant sources about the prevalence of interlocked directors. As early as 1908, the platform of one major political party called for legislation "preventing a duplication of directors among competing corporations."[7] The investigations by the so-called Pujo committee in 1913 revealed the extent of interlocking directorates among banks and other financial institutions.[8] The publication by Louis D. Brandeis of a series of articles in a popular periodical [4] also provided significant support for restrictions on such interlocks.[9] As the Supreme Court has recently noted, "Interlocks between large corporations were seen in the public debate as *per se* antogonistic to the public interest; many, including President Wilson, called for legislation that would, among other things, ban all kinds of interlocks."[10]

Several bills were introduced in Congress between 1908 and 1914 to restrict interlocking directorates by one means or [5] another.[11]

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[7] *See* National Party Platforms 1840–1968, at 146 (K. Porter & D. Johnson eds. 1970) (Democratic party platform of 1908). In 1908, the Republican party platform called for amendments to the Sherman Act in order that "its effectiveness may be strengthened." *Id.* at 146. The three major political parties in 1912 continued to call for amendments to the antitrust laws. The Democratic platform favored declaration by law of the conditions under which corporations could engage in interstate commerce, which included the prevention of interlocking directorates. *Id.* at 169. The Republicans continued support for "legislation supplementary" to the antitrust laws, *id.* at 184, and the Progressive party joined the Republicans in supporting creation of a Federal trade commission to promote antitrust enforcement. *See id.* (Republicans declare "there is much that may be committed to a Federal trade commission"); *id.* at 178 (Progressives support "strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations").

[8] House Comm. on Banking and Currency, Investigation of Concentration of Control of Money and Credit, H. Rep. No. 1593, 62d Cong., 3d Sess. (1913).

[9] Brandeis, *Breaking the Money Trusts,* Harpers Weekly, Nov. 22, 1913, to Jan. 14, 1914. In the course of debate on the Clayton Act one Congressman, citing the Brandeis articles and the Pujo report, summarized the extent of the problem of interlocking directorates as regarded even one corporation:

> Here is what the Pujo Committee found in regard to the members of the firm of J.P. Morgan & Co., and the directors of their controlled trust companies and of the First National and the National City Bank. They hold:
>
> One hundred and eighteen directorships in 34 banks and trust companies . . . .
>
> Thirty directorships in 10 insurance companies . . . .
>
> One hundred and five directorships in 32 transportation systems . . . .
>
> Sixty-three directorships in 24 producing and trading corporations . . . .
>
> Twenty-five directorships in 12 public-utility corporations . . . .
>
> In all, 341 directorships in 112 corporations having aggregate resources or capitalization of $22,245,000,000.

51 Cong. Rec. 9186 (1914) (statement of Mr. Helvering).

[10] *BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685, 4687 (U.S. June 8, 1983).

[11] Some bills contemplated a statutory ban on interlocking directorates. *See, e.g.,* H.R. 14946, Section 5, 63d Cong., 2d Sess. (1914); H.R. 7762, Section 1, 63d Cong., 1st Sess. (1913); H.R. 12835, Section 2, 62d Cong., 1st Sess. (1911). Others contemplated requiring by federal or state charter that corporations engaged in interstate commerce not

(footnote cont'd)

Some of these bills proposed a ban on interlocking directorates of any sort.[12] Others proposed simply that interlocks between competing corporations be prevented, and provided formulations of "competition" that were even less specific than the language of what became Section 8. Typical bills prevented interlocks if the corporations were "in any competing business,"[13] in "substantially the same kind of business,"[14] "engaged in the same business,"[15] "carrying on a competitive business or a business of the same general character,"[16] and "competitors or [were] so situated that they naturally should be competitors."[17] [6]

At the opposite extreme, some bills contained language that specifically mandated a measurement of the competitive effects of interlocked directorates. In certain bills declaring unfair competition unlawful, unfair competition was defined to include "the destruction of competition through the use of interlocking directorates."[18] These bills also would have authorized the proposed trade commission to terminate the "substantially monopolistic power" of a corporation that was based primarily on "artificial bases," which included "the destruction of competition through the use of interlocking directorates."[19]

It is apparent, therefore, that Congress had under consideration several bills that would make the prohibition against interlocking directorates even more clear cut than the proposal that was enacted, but that it also had under consideration proposals to make a measurement of competitive effects of such interlocks more explicit. It chose neither route. The Clayton bill was managed through a course that rejected both extremes. This fact, perhaps, accounts for Judge Weinfeld's observation on the inconclusiveness of the legislative history.

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have interlocked directors. *See, e.g.*, S. 4647, Section 8, 63d Cong., 2d Sess. (1914); S. 1138, Section 1(d), 63d Cong., 1st Sess. (1913); S. 4747, Section 1(d), 62d Cong., 2d Sess. (1912). Other bills simply prohibited corporations with certain characteristics, which included interlocking directorates, from engaging in interstate commerce. *See, e.g.*, S. 1617, 63d Cong., 1st Sess. (1913); S. 5486, Section 5(10), 62d Cong., 2d Sess. (1912); S. 1377, Section 1, 62d Cong., 1st Sess. (1911). Other contemplated definition and proscription of "unfair trade practices," including interlocking directorates. *See, e.g.*, H.R. 15652, Section 21(g), 63d Cong., 2d Sess. (1914); H.R. 9300, Section 3, 63d Cong., 1st Sess. (1913). Still other bills proposed that a federal trade commission take action against objectionable interlocks. *See, e.g.*, H.R. 14799, 63d Cong., 2d Sess. (1914).

[12] *See, e.g.*, H.R. 7762, Section 1, 63d Cong., 1st Sess. (1913) (outright prohibition); H.R. 1773, Section 64, 63d Cong., 1st Sess. (1913) (prohibiting certain directors from serving as directors in more than four corporations).

[13] *See, e.g.*, S. 1138, Section 1(d), 63d Cong., 1st Sess. (1913); H.R. 11168, Section 1(g), 63d Cong., 2d Sess. (1913) ("similar or competing business"); H.R. 9763, Section 9, 63d Cong., 2d Sess. (1913) ("corporations . . . engaged in any line of business which compete with one another").

[14] *See, e.g.*, H.R. 28852, Section 1(c), 62d Cong., 3d Sess. (1913) ("substantially competing business or in any business of substantially the same kind").

[15] *See, e.g.*, H.R. 2488, Section 1(c)(2), 63d Cong., 1st Sess. (1913); *see also* S. 4647, Section 8, 63d Cong., 2d Sess. (1914) ("same or similar kind of interstate commerce").

[16] *See, e.g.*, S. 1617, 63d Cong., 1st Sess. (1913).

[17] *See, e.g.*, H.R. 12809, Section 3, 62d Cong., 1st Sess. (1911).

[18] *See, e.g.*, H.R. 15652, Section 21(g), 63d Cong., 2d Sess. (1914); H.R. 14799, Section 11(g), 63d Cong., 2d Sess. (1914).

[19] *See, e.g.*, H.R. 15652, Section 28(g), 63d Cong., 2d Sess. (1914); H.R. 14799, Section 18(g), 63d Cong., 2d Sess. (1914).

B. *House and Senate Hearings*

Part of the difficulty in interpreting the intent of Congress as to Section 8 is that the specific language of the Clayton bill was never the subject of debate in committee hearings. In the House Judiciary Committee hearings, there was considerable debate on a tentative bill that contained a "conclusive presumption" that director interlocks between competing corporations were unlawful. In the Senate committee hearings, there was substantial debate on a proposed amendment to the trade commission bill that would have required a measurement of "substantially competitive conditions." Neither of these proposals became law.

During hearings before both the House Judiciary Committee[20] and the Senate Interstate Commerce Committee,[21] members of Congress and those testifying had before them a bill labeled "No. 3—Committee Print—Tentative Bill," which was circulated by [7] Representative Clayton and Senator Newlands.[22] The bill's language was more explicit than that of the bill that finally emerged from committee:

> Sec. 4. That if, after two years from the date of the approval of this Act, any two or more corporations, engaged in whole or in part in interstate or foreign commerce, have a common director or directors, the fact of such common director or directors shall be conclusive evidence that there exists no real competition between such corporations; and if such corporations shall have been theretofore, or are, or shall have been, by virtue of their business and location of operation natural competitors, such elimination of competition thus conclusively presumed shall constitute a combination between the said corporations in restraint of interstate or foreign commerce . . . .[23]

In the Senate, however, Senator Newlands had introduced and circulated for comment at the Interstate Commerce Committee hearings another bill which he entitled, "Amendment in the Nature of a Substitute to S. 4160," the trade commission bill.[24] Discussion on interlocking directorates at the Senate hearings centered on the language in this bill, which provided as follows:

> Section 9. That no corporation shall engage in commerce, if, upon its board of directors or other managing board or among its officers, there is any person who is a member of the board of directors or other managing board, or one of the officers of another corporation engaged in commerce and carrying on a competitive business: *Provided, however,* That no suit or action, civil or criminal, shall be instituted to enforce this section against any corporation having such community of directors or officers which,

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[20] *Hearings Before the House Comm. on the Judiciary on Trust Legislation,* 63d Cong., 2d Sess. (1914) [hereinafter cited as *1914 House Hearings*].

[21] *Hearings Before the Senate Committee on Interstate Commerce on Bills Relating to Trust Legislation,* 63d Cong., 2d Sess. (1914) [hereinafter cited as *1914 Senate Hearings*].

[22] The bill is reprinted in *1914 House Hearings, supra* note 20, at 1577–79; *1914 Senate Hearings, supra* note 21, at 70; 2 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 1077–78 (1978).

[23] *Id.* Section 4.

[24] This bill is reprinted in *1914 Senate Hearings, supra* note 21, at 237.

within one year after the passage hereof, files with the commission, or, if a common carrier, with the Interstate Commerce Commission, a petition alleging that the business of the corporations [8] involved is *not in fact competitive, or that if competitive in any degree the community of directors or officers, or both does not destroy or impair substantially competitive conditions as to such corporations* (emphasis added).

Neither this clear rule-of-reason language nor the clear irrebutable presumption language of the other tentative bill became part of H.R. 15657, which ultimately became the Clayton Act.

C. *The Clayton Bill: House and Senate Reports and Debates*

Representative Clayton introduced H.R. 15657, Section 9 of which was the interlocking directorates provision that became Section 8 of the Clayton Act, ten days after the House Judiciary Committee concluded its hearings on the trust legislation.[25] The bill was the subject of this committee's House Report No. 627, which quoted President Wilson's pronouncements against interlocking directorates and cited Section 9 extensively, but which was quite unspecific in its description of the meaning and effect of this provision.[26]

The minority views in this report are somewhat more enlightening as to the committee members' perception of Section 9's meaning. In particular, Congressman Graham of Pennsylvania, who lauded the principle of this provision, inveighed against its scope and its failure to measure competitive effects:

> This provision, however, makes the bare possibility of "elimination of competition" the test of illegality, instead of the actuality of "eliminating or lessening of competition," which is the test adopted in the provision relating to holding companies [currently Section 7. Congressman Graham here continues his earlier criticism of the "eliminating or lessening of competition" language of Section 7.]
>
> The phase "so that an elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws" affords no protection, but exposes all directors in more than one corporation engaged in interstate commerce to the peril of violating the law, because the proposed bill will be a part of the antitrust laws of the United States, and in it the "elimination of competition," or the liability to eliminate or lessen competition, instead of the creation of a monopoly or a restraint of trade, would become the governing test by which directors would be judged. [9]
>
> Under existing laws, wherever interlocking directorates exist this fact can be shown, and if the interlocking tends to establish a monopoly or creates a monopoly or a restraint of trade, it can readily be reached and corrected and the evil removed. Neither the possibilities nor the actualities of "elimination of competition" ought to be substituted for "monopoly" or "restraint of trade" as the test of illegality.
>
> This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will larger ones, against which the legislation is

[25] The Committee concluded its hearings on April 4, 1914; Rep. Clayton introduced H.R. 15657 on April 14, 1914.

[26] *See* H.R. Rep. No. 627, pt. 1, at 17–20.

presumed to be aimed.[27]

Representative Graham's comments seem to have anticipated the specific direction that the courts would take in interpreting this provision of the Clayton Act, most notably the interpretation of the court in *United States v. Sears, Roebuck & Co.*[28]

The Senate Report on H.R. 15657 provided little explanation of this provision, but merely stated that the Senate Judiciary Committee was not proposing to change or amend in any respect the specific provision concerning interlocking directorates of industrial corporations.[29] The Committee did state, however, that the general purposes of the bill included preventing antitrust violations in their incipiency:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned . . . interlocking directorates.[30] [10]

The House passed H.R. 15657 on June 5, 1914, with little relevant discussion of Section 9 on the House floor. After the Senate Judiciary Committee reported out the bill with the recommended amendments on July 22, 1914, the debate of the full Senate included a rather lengthy discussion of the meaning of Section 9. Senator Cummins had proposed an amendment of Section 9 that would have made it read as follows:

> It shall be unlawful for any person to be, at the same time, a member of the board of directors, or other managing board, or an officer in two or more corporations, either of which is engaged in commerce, and which corporations are carrying on business of the same kind or competitive in character . . . .[31]

Senator Cummins' proposed language paralleled that of a bill he had introduced the previous year, which would have prevented corporations from engaging in interstate commerce if "there is, upon its board of directors or other managing board, any person who is upon the board of directors or other managing board of any other corporation carrying on a competitive business or a business of the same

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[27] *Id.*, pt. 2, at 8 (minority views of Mr. Graham).

[28] 111 F.Supp. 614 (S.D.N.Y. 1953).

[29] S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914). The Committee did make one technical change to the language of Section 9, without explanation: "so that an elimination of competition by agreement between them. . ." became "so that *the* elimination of competition by agreement between them."

[30] *Id.* at 1.

[31] Amendment to H.R. 15657 by Mr. Cummins (Aug. 25, 1914), *reprinted in* 51 Cong. Rec. 14,534 (Sept. 1, 1914).

general character . . . ."[32]

Senator Cummins' remarks indicated his concern that the proposed language of Section 9 in the bill under debate added nothing to the existing antitrust laws. The most specific of his comments were as follows:

> That means, practically, that if a consolidation of the corporations would be a violation of the antitrust law, then interlocking directors are made unlawful. . . .
>
> If we have to prove that consolidation of the two corporations which are involved would be a violation of the antitrust law, we do not need any additional regulation of this sort. I want the regulation to go much farther and declare that if they are engaged in competition, if they are doing the same kind of business—and I am quite willing to take some form of language that expresses that idea—then there must not be this community of directors . . . .[33] [11]

There was no specific discussion of the correctness of Senator Cummins' view. The debate that ensued simply reiterated the same objections that had been raised in committee hearings about the propriety of barring interlocking directorates at all: there were benefits to be gained from interlocking directorates.[34] The court in *Sears* and a commentator[35] on that case took the view that Cummins' remarks could not be regarded as an expression of the Senate's understanding of the interlocking directorate provision:

> Senator Cummins was in the role of an advocate. His individual expression of views, clearly calculated to give weight to his contention as to the inadequacies of the proposed §8 and gain support for his amendment, may not be considered as representative of the understanding of the members of the House and Senate as to the meaning of the "so that" clause.[36]

The meaning of the statutory language and the substantive significance of the rejection of Senator Cummins' proposed amendment seems far from clear from the record of the debates.

The Senate passed H.R. 15657 on September 2, 1914. Because of the amendments made to the bill by the Senate, the bill was the subject of conference committee consideration; the conference committee

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[32] S. 1617, Section 3(a), 63d Cong., 1st Sess. (1913).

[33] 51 Cong. Rec. 14,256.

[34] *See, e.g.*, 51 Cong. Rec. 14,535 (remarks of Mr. Hitchcock) (men of experience can help establish businesses in new areas); *id.* at 14,537 (remarks of Mr. Overman) (directors with special skill are useful to more than one corporation); *id.* at 14,538 (remarks of Mr. Smith, Mich.) ("dummy directors" can evade statutory provisions).

[35] *See* Note, Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations, 54 Colum. L. Rev. 130, 131 (1954) (dispassionate interpretation unlikely in individual expression supporting substitute measure).

[36] *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 619 (S.D.N.Y. 1953). The court in *Sears* conducted a rather extended examination of the meaning of the legislative history, and noted that no committee report supported Sen. Cummins' reading, *id.* at 618; no member of the Senate stated his agreement or disagreement with Sen. Cummins' belief that consolidation was the only means by which competition might be eliminated within the meaning of Section 8, *id.;* and that it was as likely as not that Cummins' interpretation was not in accord with the understanding of the other Senators, that they did not see the difficulty that he saw, and that they, therefore, rejected his amendment because they saw no need for it. *Id.*

submitted its report on September 25. The Senate passed [12] the Clayton Act on October 5, 1914; the House did the same on October 8. The report and the debates on the compromise bill did not deal with the problem of the "so that" clause.

D. *The Problem of the Statutory Language as Seen by the Early Commentators*

The language of the "so that" clause of Section 8 remained virtually the same from its introduction by Congressman Clayton until its enactment into law. As enacted, the provision prevented interlocking directorates among any two or more corporations

> if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.[37]

The obvious problem in this language is that a violation of the antitrust laws may occur in two basic ways involving different analytic principles: it may occur by merger or other arrangement which is analyzed through a projection of probable competitive effects; or it may occur by price fixing, which is analyzed under what has become known as the *per se* approach. Thus, if two firms fixed prices, such an "elimination of competition" between them would always constitute a violation of the antitrust laws; these same two firms, however, might very well not violate any of the provisions of any of the antitrust laws if they were to "eliminate competition" by merger.

Commentators recognized the problem shortly after passage of the statute. Then-attorney John Marshall Harlan, in a 1916 treatise, gave this description of the statute's meaning:

> [T]he exception to the rule forbidding interlocking directorates as to corporations within the operation of the Clayton Law, other than banks, is very indefinite and uncertain. . . . This obviously makes the lawfulness of interlocking directorates created by two such corporations, depend finally upon an interpretation of the antitrust laws. If the two corporations, being otherwise within the terms of the Clayton Law, are competitors so that elimination of competition between them by agreement would violate any provision of the antitrust laws, they may not lawfully have interlocking [13] directorates. Otherwise they may. It would be difficult to conceive a more uncertain and shifting standard of corporate conduct than this one, by which the question of what elimination of competition between two corporations by agreement would constitute a violation of the antitrust laws, is made the test of the lawfulness of an interlocking directorate between such corporations.[38]

An even more succinct description of the problem in Section 8 is

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[37] Clayton Act Section 8, ch. 323, 38 Stat. 730 (1914), *current version at* 15 U.S.C. 19.

[38] J. Harlan & L. McCandless, The Federal Trade Commission: Its Nature and Powers 20 (1916).

contained in a classic 1924 treatise on the young Federal Trade Commission:

> The difficulty in applying the test lay in the fact that no one could state with assurance under what circumstance the elimination of competition by agreement would constitute a violation of the antitrust laws. It seemed to have been generally conceded, as we have seen, that if the agreement by which competition was eliminated comprised a transfer of property, and was made with a view to effecting economies, it was legal. There were dicta, on the other hand, that a bare agreement not to compete, without merger or sale, was illegal under any circumstances. Yet under the rule of reason, the test of illegality was the test of unreasonableness at common law, and by the weight of authority an agreement limiting competition between two concerns was not illegal at common law if they controlled between them so small a part of the field that it remained as a whole freely competitive. Since these agreements did not restrain the promissor entirely from carrying on his business, but merely limited "the mode or manner in which a trade is carried on," they were considered to be merely partial restraints, and to be lawful if reasonable and for good consideration. Yet in view of the dicta in the *Addyston Pipe* and *Dr. Miles Medical Company* cases, and of the emphatic opinion of the Chief Justice, it was not at all clear that this view of the common law would be carried over into the interpretation of the Sherman Law. It is unfortunate, to say the least, that the draftsmen of a statute designed to give clarity and definition to the law of restraints and monopolies, should have permitted the lawfulness of a common directorship to turn upon this highly controversial question.[39] **[14]**

The ultimate result of this controversy, of course, was one that these commentors perhaps could not have fully appreciated: a rule-of-reason approach for some antitrust violations and a *per se* approach for others. The place of Section 8 liability within this spectrum of views was thus initially open to debate, but, as will be seen, the courts addressed these analytic questions in subsequent years. One answer they gave was that the "agreement" between interlocked directorates could be one contemplated by the price-fixing prohibitions of the Sherman Act—the only other antitrust law extant when the Section 8 language was written. And expressly, as the Commission observes in its opinion here, courts rejected the Section 7 analytic analogy on the basis of a reading of the complete history of both statutes. Moreover, the courts have added that no actual Sherman Act agreement need be demonstrated, since potential violations of the law could be curbed in their incipiency through an outright ban on interlocking directorates between competing corporations.[40] In a nutshell, the courts have taken the view that the statute simply means what it says: if an agreement between interlocked directors would violate *any* of the antitrust laws, the interlock is unlawful.

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[39] G. Henderson, The Federal Trade Commission 38–39 (1924) (footnotes omitted).

[40] Such a broad proscription was applicable only to corporations other than banks and common carriers, which the Congress chose to regulate in a distinctly different manner. *See BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685 (U.S. June 8, 1983).

E. *Subsequent Congressional Consideration*

Two major studies[41] of interlocking directorates have been undertaken in Congress since 1914, neither of which addressed the problem of the statutory language of Section 8, but both of which affirm a strict congressional attitude towards statutory liability.

The first, a study conducted by the staff of the Antitrust Subcommittee of the House Judiciary Committee in 1965, noted the *Sears* case and stated that it "establishes the test that is applicable when the ["so that" clause] is defined."[42] This report also explained the scope of Section 8 as follows: [15]

> The statute does not require a demonstration that competition in fact has been adversely affected. This provision seeks to avert a reduction in competition that exists between relatively large corporations. It is narrow in scope and is based on the virtually inescapable conclusion that meetings of directors under the conditions prohibited necessarily would impair the vigor of competition.[43]

The second congressional study was conducted by the staff of the Subcommittee on Reports, Accounting, and Management of the Senate Committee on Governmental Affairs.[44] The study described in detail the drawbacks and benefits of corporate interlocks,[45] and in its conclusion noted as follows:

> Such interlocking directorates among the Nation's very largest corporations may provide mechanisms for stabilizing prices, controlling supply and restraining competition. They can have a profound effect on business attempts to influence Government policies. They can impact on corporate decisions as to the type and quality of products and services to be marketed in the United States and overseas. They can influence company policies with respect to employee rights, compensation and job conditions. They can bear on corporate policies with respect to environmental and social issues and possibly, control the shape and direction of the Nation's economy.[46]

E. *Applicable Judicial Precedent*

As noted at the outset, Judge Weinfeld in the *Sears* case squarely faced the problem of the legislative history of Section 8, and found ample justification in that history to conclude that the purposes of the statute and the statutory language were susceptible of a *"per se"* approach. He reasoned that the "so that" clause was not a require-

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[41] These do not include a study prepared by the Federal Trade Commission for Congress in 1950. *See* Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1950).

[42] Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, Interlocks in Corporate Management 59 (Comm. Print 1965).

[43] *Id.* at 26.

[44] Interlocking Directorates Among the Major U.S. Corporations, 95th Cong., 2d Sess. (Comm. Print 1978).

[45] *See id.* at 3–9.

[46] *Id.* at 280–81.

ment that an anticompetitive agreement between interlocked directorates be proved or that anticompetitive effects of an interlocking directorate be demonstrated. He emphasized instead the "preventative [sic] nature of Section 8": [16]

> While the government does not charge that any such agreement has here been made or is contemplated, a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation. The fact that this has not happened up to the present does not mean it may not happen hereafter.[47]

Judge (now Justice) Stevens, writing for the Court of Appeals for the Seventh Circuit in 1973 in *Protectoseal Co. v. Baranick,* 484 F.2d 585 (7th Cir. 1973), embraced the reasoning of Judge Weinfeld. Likewise, the Court of Appeals for the Ninth Circuit endorsed the *Sears* standard in its recognition of the prophylactic nature of the statute:

> The purpose of Section 8 was "to nip in the bud incipient antitrust violations by removing the opportunity or temptation for such violations through interlocking directorates."[48]

This line of authority is one described by the dissenters as "sparse, conflicting, and indeterminative." In contrast, I believe the Commission's decision on liability in this case is grounded on solid precedent, itself based on a careful consideration of the legislative history of this statute. There is, to be sure, evidence in this history of a diversity of contending views, but the statute reflects a deliberate choice of strict antitrust liability amply ratified by subsequent judicial examination of the chosen statutory proscription. "We are bound to respect that choice; we are not to rewrite the statute based on our notions of appropriate policy." *BankAmerica Corp. v. United States,* 51 U.S.L.W. 4685, 4690 (U.S. June 8, 1983).

F. *The De Minimis Commerce Issue*

The dissenting opinion suspends its skepticism of judicial precedent in its reliance on a 1966 decision, *Paramount Pictures Corp. v. Baldwin Montrose Chemical Co., Inc.,* 1966 Trade Cas. (CCH) ¶71,678 (S.D.N.Y. 1966). That district court decision, [17] which the Commission has acknowledged in its opinion, recognizes a *de minimis* exception.[49]

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[47] *United States v. Sears, Roebuck & Co.,* 111 F.Supp. 614, 620 (S.D.N.Y. 1953).

[48] *TRW, Inc. v. FTC,* 647 F.2d 942, 946–47 (9th Cir. 1981), *citing United States v. Crocker National Corp.,* 422 F.Supp. 686, 703 (N.D. Cal. 1976).

[49] The Commission's opinion and the dissenters add the *Sears* case to *Paramount* as one recognizing a *de minimis* exception. In *Sears,* however, the court's treatment of "the *de minimis* principle" appears directed more to whether there was sufficient interstate commerce upon which federal jurisdiction could constitutionally be grounded. The dissenters acknowledge this point.

It seems odd to me that if it can be concluded that Section 8 has *per se* applicability, it can be conceded on the basis of any remaining legislative history that there adheres to the statute a *de minimis* commerce exception in addition to the express requirement that corporate respondents have at least $1 million in sales.

But the Commission did not have to bootstrap itself into its rejection of a *de minimis* commerce exception to liability in this case. In *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981), the court expressly disavowed such a defense. The dissenters argue only that the Ninth Circuit's judgment "was not necessary to the decision of the case," because the FTC opinion under review took the view that the *de minimis* competition issue did not really arise where the overlapping levels of commerce were as high as $1 million and $7 million. Of course, in the present case, the overlapping levels of commerce are $.9 to 1.1 million and $5.4 million, which fall into the same category as *TRW* (or, for that matter, *Protectoseal,* where the overlapping commerce did not exceed $1.5 million on either leg of the overlap). However, the court in *TRW* did not engage in a gratuitous disquisition on the law in this area; respondent TRW had argued on appeal that a *de minimis* defense applied to Section 8—an argument that the court rejected directly, but which the dissenters seek to resurrect here. The Commission, on the other hand, is merely following the precedent set (quite recently, in this instance) in its own *TRW* case—as indeed, it would be anomalous if it did not.

Conclusion

The dissent in this case argues for a sea change in the law applicable to interlocking directorates between competing corporations that would depart from the strict liability standard existing heretofore. The Commission has chosen in its opinion to eschew the dissenters' wish list, based on their convictions of appropriate antitrust policy, and to follow instead the well-posted road laid out by Section 8, its complete legislative history, subsequent congressional sentiment, and virtually all decided cases.

Final Order

This matter has been heard by the Commission upon the appeals of respondents and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has determined to deny the appeal as to respondents and as to complaint counsel. Accordingly,

It is ordered, That the findings of fact and initial decision of the

Administrative Law Judge be adopted insofar as not inconsistent with the findings of fact and conclusions of law contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered: [2]

The following definitions shall apply in this order:

Bosch Corporation means Robert Bosch Corporation (Bosch U.S.), Robert Bosch GmbH (Bosch GmbH), their controlled subsidiaries, or the successors or assigns of either corporation.

Competitor means a corporation that by virtue of its business and location is in competition with the subject corporation, so that elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

I

It is ordered, That respondent Borg-Warner and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, any individual serve as a director who

(a) serves at the same time on the board of management and/or board of directors of any Bosch Corporation as long as such corporation is a competitor in the production or sale of any product or service with Borg-Warner; or

(b) serves at the same time on the board of directors and/or board of management of any corporation as long as such corporation is a competitor of Borg-Warner in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either corporation derived from the product or service market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Borg-Warner any statement required by paragraph IV of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

II

It is further ordered, That respondents Bosch GmbH and Bosch U.S. and their successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of management or board of directors any individual who

(a) serves at the same time on the board of directors of Borg-Warner, as long as Borg-Warner is a competitor in the production or sale of any

product or service with the Bosch Corporation on whose board the director sits; or [3]

(b) serves at the same time on the board of directors of any corporation as long as such corporation is a competitor of the Bosch Corporation on whose board the director serves in the production or sale of automotive parts for the aftermarket, and as long as the revenues of either competing corporation derived from the product or service market or markets in which they are competitors exceed five million dollars; or

(c) fails to submit to Bosch GmbH or Bosch U.S. any statement required by paragraph IV of this order.

The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

III

It is further ordered, That respondent Hans L. Merkle shall forthwith cease and desist from serving, and in the future shall not serve, as a director both of Borg-Warner and of any Bosch Corporation that is a competitor of Borg-Warner. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

IV

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall obtain a written, certified statement from each member of their board of directors or board of management (except directors whose terms expire at the next election and who are not standing for reelection) and from each nominee for a directorship or seat on the board of management (who is not then a director) showing

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation that the director or nominee then serves as a director or has been nominated to serve as a director at the time of the statement.

Provided, however, That in complying with the provisions of paragraph IV(b), the information to be furnished to Bosch GmbH concerning its directors may be limited to those corporations engaged in

commerce within the United States and those products and services sold or offered for sale by such corporations within the United States. [4]

The requirements of this paragraph shall not apply to elections of directors occurring after ten (10) years from the effective date of this final order.

Nothing in this paragraph shall be construed to relieve respondents of their obligations under paragraphs II(a) and III(a) above due to any error or omission contained in any written statement received pursuant to this paragraph.

V

It is further ordered, That within forty-five (45) days of the effective date of this final order, and annually for a period of ten (10) years thereafter, respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall file with the Commission separate, written reports setting forth in detail the manner and form in which each has complied with this order. Copies of the statements obtained pursuant to paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph.

VI

It is further ordered, That respondents Borg-Warner, Bosch GmbH, and Bosch U.S. shall notify the Commission at least thirty (30) days prior to any change in the corporations or in their relationships to each other such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order. The requirements of this paragraph shall be effective for a period of ten (10) years from the effective date of this final order.

Chairman Miller and Commissioner Douglas dissented.

Proposed grant of exclusive right to offer radiology services at a hospital would not violate the FTC Act. [*833 0003, Burnham Hospital*]

February 24, 1983

Dear Mr. Nord:

This is in response to your request for an advisory opinion concerning a contract by which Burnham Hospital has granted to a physician group the exclusive right to provide radiology services to patients in the hospital. You have asked whether any law enforced by the Commission would be violated if Burnham, acting pursuant to the contract, determines that a physician not affiliated with that group should not be given access to its radiology facilities or authorization to provide radiology services to Burnham's patients.

Based on the information you have supplied, it is the Commission's understanding that Burnham Hospital is a nonprofit general acute care hospital located in Champaign, Illinois. Among the services Burnham offers to the public are diagnostic radiology services. The hospital owns radiology laboratory facilities and employs approximately 20 radiology technicians. Throughout its history, Burnham has provided radiology services either through a radiologist employed by the hospital or a radiology group under exclusive contract with it.

You have explained that in 1980 the hospital, after receiving and considering proposals from other radiology groups, entered into a contract with a group of radiologists practicing under the name Prairie Professionals ("Prairie") that gives Prairie the exclusive right to operate the hospital's radiology laboratory and to render radiology services to patients at the hospital. Prairie is responsible for providing radiology services as needed; supervising and discharging the radiology technicians who are employed by the hospital; consulting with the hospital on the selection and replacement of equipment; and participating in educational and scientific activities at the hospital, including the training of radiology technicians. In addition, Prairie is to designate a radiologist to function as department chief, who will be responsible for operating the department and helping the hospital to control the department's budget. The contract has a term of three years; thereafter it is renewable for one-year periods and may be terminated by either party on 180-days notice. The hospital bills patients for the use of its radiology facilities. Prairie bills the patient separately for its professional services on a fee-for-service basis.

Prairie physicians are members of Christie Clinic ("Christie"), a large multispecialty physician group. Pursuant to a separate contract with Burnham, Christie purchased a full-body computed tomographic

("CT") scanner which it installed on hospital premises. Under the contract, Christie designates the physicians who may use the scanner.

You state that a physician has requested to practice radiology independently at Burnham notwithstanding the exclusive agreement with Prairie. Burnham would like to deny this physician access to its radiology facilities in order to adhere to, and retain the benefits of, the contract with Prairie.

According to your letter, Burnham believes that the contract is in the hospital's economic interest and that it improves the quality of services provided at the hospital. Specifically, the hospital believes that the contract creates cost efficiencies in procuring radiological services for its patients, operating and maintaining its equipment, and supervising its radiology technicians.

In addition to Burnham Hospital, there are three other general acute care hospitals in the Champaign-Urbana area from which Burnham draws patients. Burnham has 214 beds, Mercy Hospital has 255 beds, Carle Foundation Hospital has 281 beds, and Cole Hospital has 65 beds.[1] Thus, Burnham has about 26 percent of the beds in what Burnham describes as the relevant area. Carle is associated with a clinic, and only members of the clinic are permitted to have privileges at that hospital. Mercy and Cole each has an exclusive contract with a different group of radiologists; Carle has a closed staff in all its departments. The radiology contracts at both Cole and Burnham have changed hands in recent years.

Your letter states that Burnham offers no facilities or services not available in at least one of the other area hospitals. Both Carle and Burnham have full-body CT scans, the one at Burnham being owned by Christie Clinic rather than by the hospital. Both Carle and Mercy offer therapeutic radiological services that are not available at Burnham.

You also state that some Champaign-Urbana radiologists provide services to hospitals in surrounding communities. Radiology services are also available outside the hospital from independent radiology laboratories. Burnham accepts radiological studies from other hospitals or from independent laboratories at the discretion of the attending physician.

Antitrust analysis of hospital exclusive contracts can be complicated because the contracts create relationships among hospitals, physicians, and patients that have no clear parallels in commercial practice and that are difficult to characterize. The contract occurs at one level—between the hospital and the physician—while the direct financial transaction occurs at a different level—between the physi-

[1] There are three other hospitals in the Champaign-Urbana area that do not seem to be in substantial competition with the four mentioned above. McKinley Memorial Hospital has 31 beds and is affiliated with the University of Illinois. Herman Adler Mental Health Center is a state-run long-term care facility for children with 46 beds. The hospital at Chanute Air Force Base has 55 beds, but apparently is not open to the general public.

cian and the patient, with payment usually made by an insurer. Some court decisions suggest that in analyzing exclusive contracts the patient should be considered the buyer and the hospital and the physician group the sellers of the service in question.[2] Another court has suggested that the hospital rather than the patient should be considered the buyer of the service, and the physician group the seller, in cases where the patient generally does not make a personal decision to obtain the service and does not personally select the provider.[3] The Commission is of the opinion that each approach may be helpful in some circumstances, because exclusive contracts may affect both competition among physicians and hospitals for patients and competition among physicians to market their services to hospitals. Accordingly, antitrust analysis should be flexible enough realistically to take into account the impact of these contracts on hospitals, physicians, and patients.

An exclusive contract for radiology services can have both procompetitive and anticompetitive aspects. The contract grants exclusivity within the hospital to a particular radiologist or group of radiologists and thereby limits the ability of the patient and the attending physician to choose among competing radiologists. It may also, if radiologists contract in groups, make it more difficult for individual physicians to enter the market since a physician may have to join an existing group or form a new group in order to practice in the area.

A contract of reasonable duration does not, however, eliminate competition among radiologists or prevent entry. Instead, it shifts the focus of competition among both established and entering radiologists to the securing of the contract. The exclusive contract may also have procompetitive effects by providing a number of benefits to hospitals and to their patients. There is reason to believe that in some circumstances at least, the use of exclusive contracts in certain hospital departments can facilitate efficient delivery of services in a number of ways. It can increase the hospital's control over operation of the department, ensure full-time availability of services, lower costs through standardization of procedures and centralized administration of the department, permit better scheduling of the use of facilities, facilitate maintenance of equipment, improve supervision of support staff and working relationships between the staff and physicians, and improve the quality of services by assuring that physicians perform enough procedures to maintain their proficiency, have an incentive to upgrade their skills, and are effectively subject to hospital standards of quality.[4] To the extent that these objectives are real-

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[2] *Robinson v. Magovern*, 521 F.Supp. 842, 885 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 842 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82–415); *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 513 F.Supp. 532 (E.D. La. 1981), *rev'd on other grounds*, 686 F.2d 286 (5th Cir. 1982), *petition for cert. filed*, No. 82–1031 (Dec. 17, 1982).

[3] *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982).

[4] *See, e.g.*, Foster, *Exclusive Arrangements Between Hospitals and Physicians: Antitrust's Next Frontier in Health?*, 26 St. Louis U.L.J. 535, 540–41 (1982); M. Thompson, *Antitrust and the Health Care Provider* 151–52, 154 (1979).

ized, a hospital is better able to compete with other hospitals.

Hospitals must assure that radiology services are available as needed and of acceptable quality if they are to attract attending physicians and their patients. When the decision to use an exclusive contract to staff a hospital-based department is made unilaterally by a hospital in order to promote efficient operation of the department, when the hospital lacks significant power in the relevant market, and when the contract is of reasonable duration or terminable by the hospital on reasonable notice, the contract would not generally be likely to have a substantial anticompetitive effect in any market.[5]

Several courts considering antitrust challenges to exclusive contracts for hospital services have treated the agreements as vertical restraints subject to rule of reason analysis.[6] In balancing the procompetitive and anticompetitive effects of the contracts in the hospital and physician services markets, the courts have considered such factors as the characteristics of the market, particularly the market power of the hospital in question; the purpose of the contract; its duration; the manner in which the decision was made to use an exclusive arrangement; and the procompetitive benefits of the contract. These courts have not found that the exclusive contracts considered had significantly anticompetitive effects, and they have found that the contracts resulted in significant competitive benefits to the hospitals.

One recent decision, however, held that an exclusive contract for anesthesia services constituted a per se illegal tying arrangement. *Hyde v. Jefferson Parish Hospital District No. 2,* 686 F.2d 286 (5th Cir. 1982), *petition for cert. filed,* No. 82–1031 (Dec. 17, 1982). The court in that case construed the contract as tying the sale of the hospital's chosen anesthesia service to the use of its operating rooms, found that the hospital had appreciable economic power in the township in which it was located, and concluded that the contract restrained, and indeed eliminated, competition among anesthesiologists in the hospital.

The Commission is of the opinion that the per se rule of illegality for tie-ins is not applicable to Burnham's contract with Prairie Profes-

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[5] A different case would be presented if the hospital joined a conspiracy among members of the medical staff to restrain competition among hospital-based physicians. *See Robinson v. Magovern,* 521 F.Supp. 842, 906 (W.D. Pa. 1981), *aff'd mem.,* 688 F.2d 824 (3d Cir. 1982), *cert. denied,* 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82–415); *State of Maryland v. The Medical Staff of Harford Memorial Hospital,* Circuit Court for Harford County, Equity No. 27734 (Oct. 29, 1981) (assurance of discontinuance obtained from hospital staff that allegedly threatened to refuse to deal with any but a specified group of radiologists in an attempt to coerce the hospital into contracting with the group on terms demanded by it). In addition, different questions would be raised under the antitrust laws if a large proportion of the specialists in a market formed a group and negotiated jointly with a number of hospitals in the area.

[6] *Hyde v. Jefferson Parish Hosp. Dist. No. 2,* 513 F.Supp. 532 (E.D. La. 1981), *rev'd,* 686 F.2d 286 (5th Cir. 1982), *petition for cert. filed,* No. 82–1031 (Dec. 17, 1982); *Smith v. Northern Michigan Hospitals, Inc.,* 518 F.Supp. 644 (W.D. Mich. 1981), No. 81–1513 (6th Cir. argued Oct. 21, 1982). *See also Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346 (7th Cir. 1982); *Robinson v. Magovern,* 521 F.Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3rd Cir. 1982), *cert. denied,* 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82–415).

sionals. Although radiology services are physically separable from other services and facilities supplied by Burnham, mere separability is not a sufficient basis for characterizing an arrangement as a tie-in. Instead, the function of the aggregation must be examined to see if the restraint represents the forced purchase of a second distinct commodity to leverage power from one market to another in order to avoid competition on the merits.[7] The purposes and effects of the contract in question are very different from such a classic tie. Rather than avoiding competition on the merits, Burnham is attempting to compete with other hospitals by obtaining efficiencies and a desired level of quality and service in its radiology department, according to the submission. Using a form of vertical integration to combine functionally related services, the hospital is apparently seeking to improve the array of health care services that it offers to the public. Moreover, the case law indicates that no tie-in should be found to exist where, as here, the hospital derives no direct or exploitative financial benefit from requiring that all diagnostic radiology services in the hospital be provided by a particular group of physicians.[8] In short, the contract is not the type of pernicious, naked restraint of trade to which the per se rule of illegality applies.

The Commission believes that Burnham's contract is most closely analogous to a requirements contract, a type of exclusive dealing arrangement, that should be judged under the rule of reason in a fashion similar to that for more traditional vertical restraints.[9] The Commission's analysis of the contract focuses on whether its effects on competition among radiologists and among hospitals are on balance harmful or beneficial. Factors relevant to the analysis include the proportions of the hospital and physician services markets involved in the contract, the purposes of the contract, its duration, the extent to which it deters entry, the benefits the hospital and the public derive from it, and the extent of competition for the contract.[10]

Based on the information available to the Commission, it does not appear on balance that Burnham's adherence to its contract with Prairie Professionals would violate the Federal Trade Commission Act or any other law enforced by the Commission. You report that the contract was intended to, and does, facilitate efficient operation of the radiology department. The Commission understands that the decision

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[7] *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953); *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82–570); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

[8] *See, e.g., Boddicker v. Arizona State Dental Ass'n*, 680 F.2d 66 (1982), 1982–2 Trade Cas. (CCH) ¶ 64,812 (9th Cir. March 24, 1982); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453 (5th Cir. 1979); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977); *Rodrique v. Chrysler Motor Corp.*, 421 F.Supp. 903 (E.D. La. 1976); *Crawford Transport Co., Inc. v. Chrysler Corp.*, 338 F.2d 934 (6th Cir. 1964); *Rumple v. Bloomington Hospital*, 422 N.E. 2d 1309 (Ind. App. 1981).

[9] *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3354 (Nov. 8, 1982).

[10] *See Beltone Electronics Corp.*, FTC Docket 8928, slip op. at 34 [100 F.T.C. 68 at 204] (July 6, 1982).

to enter into the contract, and thus to deny radiology privileges to other physicians, was made unilaterally in the interest of the hospital, and was neither coerced by members of the medical staff nor taken in furtherance of a combination between the hospital and the medical staff or any of its members to restrain competition among physicians. Burnham competes with at least three other hospitals, and does not occupy a dominant position in the market. It is not a unique facility. The contract has an initial term of three years with one-year extensions thereafter, and is terminable on 180-days notice by either party. Thus, opportunities for competition among radiology groups to secure the contract are preserved, and there is evidence that some competition for contracts does occur. In addition, radiology can be practiced to at least some extent on an outpatient basis, and Champaign-Urbana radiologists apparently have some access to hospitals in the surrounding area. In addition, there is no reason to believe that effectuation of the contract would result in higher prices for radiology services. Based on these factors, it appears that the contract does not unreasonably restrict competition among radiologists and that it may facilitate competition among hospitals.

Based on its understanding of the facts surrounding the decision to enter into the exclusive contract and the planned denial to other applicants of the right to practice radiology in the hospital, pursuant to that contract, as those facts are outlined above and further detailed in your submission, it is the Commission's opinion that Burnham Hospital's adherence to its grant to Prairie Professionals of the exclusive right to offer radiology services at the hospital would not violate the Federal Trade Commission Act or any other statute enforced by the Commission.[11]

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. Because by necessity it is based on factual representations by the hospital, it does not constitute approval of action taken by the hospital on any specific application for privileges that may become the subject of litigation before the Commission or any court, when those facts may be controverted. The conclusions stated in this letter are based on the Commission's understanding of present market conditions in the Champaign-Urbana area and in the health care field generally. The Commission retains the right to reconsider the questions involved or to rescind or revoke its opinion if the public interest so requires in accordance with Section 1.3(b) of the Rules of Practice.

By direction of the Commission.

[11] By responding to Burnham's request for an advisory opinion concerning the described facts, the Commission takes no position on the presence or absence of any or all of the jurisdictional prerequisites to a law enforcement proceeding under Section 5 of the FTC Act, 15 U.S.C. 45.

Letter of Request

November 17, 1982

Dear Mr. Thomas:

I am writing on behalf of Burnham Hospital, located in Champaign, Illinois, for an advisory opinion. The Hospital desires to limit the physicians entitled to use its radiological laboratory equipment and render radiological services to inpatients to that physician group with which the Hospital has exclusively contracted to provide these services.

Burnham Hospital is a public, not for profit, general acute care hospital. Among other services that it offers the public, the Hospital provides diagnostic radiology services. It owns its own radiology laboratory facilities and equipment, and employs approximately 20 radiology technicians. Throughout its history, the Hospital has provided radiology services to the public through either a radiologist employed by the Hospital, or a single radiology group under exclusive contract to the Hospital.

On April 9, 1980, the Hospital entered into a contract with a group of radiologists, practicing under the name of Prairie Professionals, that gives that group the exclusive right to operate the Hospital's radiology laboratory, and to render radiological services to patients at the Hospital's facilities. The contractual responsibilities of Prairie Professionals include providing radiology services as needed; supervising and discharging radiology technicians who are employed by the Hospital; consulting with the Hospital on the selection and replacement of equipment; and participating in education and scientific activities at the Hospital, including the training of radiology technicians. In addition, Prairie Professionals designates the radiologist who serves as chairman of the department of radiology, who is responsible for operating the department of radiology and helping the Hospital to control that department's budget. The Hospital bills patients for use of its radiology facilities, while Prairie Professionals submits its own bill to the patient for professional services rendered, on a fee-for-service basis. The contract has a term of three years and may be renewed thereafter for one year periods. It may be terminated at any time by either party upon 180 days notice. A copy of the Agreement between Burnham Hospital and this physician group is attached.*

Physicians in Prairie Professionals are members of Christie Clinic, a large multi-specialty physician group located in Champaign, Il-

* Not reproduced herein. Copies of all Attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

linois. Non-radiologists practicing as members of Christie Clinic also hold privileges at Burnham Hospital. By a separate contract, which preceded and is unrelated to the exclusive contract that is pertinent to this request, Christie Clinic has installed a full body CT scanner the Clinic owns at Burnham Hospital. Pursuant to that separate agreement, Christie Clinic receives a percentage of revenues attributable to use of the CT scanner, and limits the physicians who may use the CT scanner to certain specified radiologists and neurologists.

The Hospital believes that the exclusive contract with Prairie Professionals is in the Hospital's economic interest, and that it improves the quality of services provided at the Hospital. Specifically, the contract creates cost efficiencies in procuring radiological services for its patients, operating and maintaining its equipment, and supervising its radiology technicians.

A former employee of Prairie Professionals has requested that the Hospital permit him to use the Hospital's equipment and render radiological services to in-patients, notwithstanding the Hospital's exclusive agreement with the physician group. The physician withdrew from practice and resigned from Prairie Professionals due to disability. He retains privileges at Burnham Hospital and recently sought permission from the Hospital to reactivate his practice. The Hospital would like to adhere to its exclusive contract with the physician group and deny this physician access to its radiological facilities for that reason.

In addition to Burnham Hospital, three other general, acute care hospitals serve the same area (Champaign-Urbana, Illinois) from which Burnham Hospital draws its patients. Burnham Hospital has 214 beds, Mercy Hospital has 255 beds, Carle Foundation Hospital has 281 beds and Cole Hospital has 65 beds. In addition to these hospitals, two other hospitals in the area appear to serve a more restrict patient group (McKinley Memorial Hospital has 31 beds and is affiliated with the University of Illinois; Chanute Air Force Hospital, at the Air Force base of that name, has 55 beds). Without considering these hospitals that serve specific patient populations, Burnham Hospital has about 26 percent of the hospital beds in the relevant geographic area.

Burnham offers no facilities or services not available at one or more of the other area hospitals. Both Carle Foundation Hospital and Burnham Hospital have full body CT scanners (the one at Burnham being owned by Christie Clinic, rather than the Hospital). Both Carle Foundation Hospital and Mercy Hospital offer therapeutic radiological services that are not available at Burnham Hospital. Mercy Hospital and Cole Hospital are believed to have exclusive contracts for radiology services, each with a different group of radiologists. Carle Foundation Hospital is associated with the Carle Clinic, and only physicians

who are members of that clinic are granted privileges at that hospital; it therefore has a closed staff in all of its departments.

Within the past four years, Burnham Hospital has twice entered into an exclusive contract with different groups of radiologists. On both occasions, the Hospital received and considered competing proposals from several groups of radiologists before making its decision. In addition, it is believed that Cole Hospital has also changed the radiology group that provides its radiology services.

In addition to opportunities with radiology groups serving specific hospitals, radiologists in the Champaign-Urbana area also engage in independent, private practice through their own laboratories. Burnham Hospital accepts pre-admission radiological studies of patients by other hospitals or by independent radiology laboratories without any need for duplication of x-rays, except where the quality of the specific study is deemed to be unacceptable by the treating physician. Some radiologists in the Champaign-Urbana area also provide radiological services to hospitals up to 35 miles away, while a radiologist group from a nearby town serves one of the Champaign hospitals.

By consent decree, the Commission is understood to have created an opportunity for certain hospital-based physicians to practice as full time employees of the hospital, *In the Matter of The American Society of Anesthesiologists,* 93 F.T.C. 101 (1979). By permitting full time employment of hospital-based physicians, the Commission has correctly viewed the vertical integration of such hospital-physician services as pro-competitive. Where such integration of services is determined by a hospital to be in its competitive interest, by reducing a variety of its costs and increasing the quality of the service it provides to patients, the form of such vertical integration—by direct employment or by exclusive contract—is irrelevant to the effect of the particular hospital-physician arrangement upon competition in the provision of the service.

Burnham Hospital can compete in providing health care services only through the services rendered on its premises. The teaching of *Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), concerning a supplier's interest in fostering interbrand competition by diminishing the effects of intrabrand competition, should be directly applicable. No manufacturer is obligated by law to accept all prospective distributors nor to retain all distributors it has ever used. Similarly, no hospital should be required to permit any particular physician to practice at the hospital if it determines that to do so would make the hospital a less effective competitor. The hospital's competitive self-interest entitles it to determine both how it will organize itself and who it will employ (as employee or as independent contractor) to render hospital-based services to its patients.

Any theoretical benefit achieved by making every hospital a "physi-

cian's utility", as would exist if each hospital were required to organize and operate as a business forum for every qualified physician, is outweighted by increased costs of operation and the loss of substantial control over the quality of one's own "product", i.e., health care services. In such a system, the patient consumer would be the loser. Hospital services would cost more because of increased administrative costs to coordinate and manage the hospital's medical staff. And the patient's information costs would greatly increase because he or she could no longer rely on the hospital's choice of its staff as an indicator of quality.

The purpose of this request for an advisory opinion is to determine whether, by denying the request of this individual physician which Burnham Hospital believes to be in its economic self interest, the Hospital will thereby expose itself to possible prosecution by the Commission for violation of any law the Commission is charged to enforce. Moreover, with the burgeoning of suits filed against hospitals by physicians arising out of a denial or withdrawal of medical staff membership or hospital clinical privileges, Burnham Hospital believes that this question is a matter of significant public interest and involves a substantial question of law as to which there is no clear Commission or court precedent.

We request the opportunity to supplement the information as set forth in this letter insofar as Burnham Hospital, or the Commission, may determine that additional facts or analysis is appropriate.

Very truly yours,

/s/ *Robert E. Nord*

Disclosure of individual well information to persons not involved in the production or sale of natural gas who required the data solely for research or study purposes, provided they agree not to disclose individual well data, would be permissible, as well as proposed data collection and use program, subject to certain qualifications. [*Resource Analysis & Management Group, 833 0001*]

April 18, 1983

Dear Mr. Legg:

This responds to your request for an advisory opinion concerning the collection by the Resource Analysis & Management Group (the RAM Group) of certain information from high-cost natural gas producers for use in consulting services.

The Commission has been advised that the RAM Group is a consulting operation with no owner or principal engaged in the exploration for or production of natural gas. The Commission understands that the RAM Group proposes to collect price and contract term information for existing supply contracts from producers of high-cost natural gas as defined by Section 107 of the Natural Gas Policy Act of 1978, and to use such information principally in price recalculations under redetermination clauses in supply contracts between producers and purchasers.

The Commission further understands that the RAM Group will provide, on a non-discriminatory basis, redetermination counseling services, which use the data collected under this proposed program, to any natural gas producer or purchaser which requests, and which possesses the ability and willingness to pay for, such services. Individual well information will be revealed only to the producer and purchaser involved in a specific price recalculation and only as specifically required by the redetermination clause in an existing supply contract for a Section 107 well. Individual well information will not be disclosed to any other party or client of the RAM Group.

As you are aware, price information exchanges among competitors in particular marketing environments could raise serious antitrust concerns. In view of the Supreme Court's opinion in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), the legality of the RAM Group's proposal to provide natural gas producers and purchasers with current competitive price and other data for redetermination purposes depends upon a factual assessment of the structure and other economic characteristics of the markets involved, the nature and purpose of the plan to obtain and provide such data by the RAM Group, and the probable effect of the collection and dissemination of such data on

natural gas prices and the interdependency of natural gas producers in such markets.

On the basis of available information indicating low concentration of natural gas production on a national basis, the availability of price information to larger producers and purchasers, and the need for reliable price adjustment mechanisms in natural gas supply contracts, the Commission does not presently see any competition problems posed by the RAM Group's proposed program of providing Section 107 well price and other data to natural gas producers and purchasers in accordance with the limitations noted above. The Commission cautions, however, that the program must not be used by the RAM Group or its clients to restrict independent business decisions by any individual firm, to secure adherence to quotas of production or sales, to facilitate joint determination of prices by competitors, or to effect any other such unlawful trade restraint. The Commission reserves the right to conduct any further investigation of the RAM Group program as may be in the public interest based on additional information or changed circumstances which may indicate an anticompetitive purpose or effect.

Accordingly, the Commission does not presently object to the proposed data collection and use program of the RAM Group, subject to the above qualifications. The Commission also does not object to the RAM Group's disclosure of individual well information to persons not involved in the production or sale of natural gas who require the data solely for research or study purposes, provided that they agree not to disclose individual well data.

By direction of the Commission.

Letter of Request

November 25, 1980

Dear Sir:

Our client is Resource Analysis and Management Group, 2500 First National Building, Oklahoma City, Oklahoma, whose business is to act as economic consultants to the oil and gas industry. Its Managing Partner is William W. Talley II, Ph.D. whose curriculum vitae is enclosed.* It is consulted by numerous private producers and purchasers of oil and gas produced throughout the United States, and by several State Governments and consumer groups. As a consultant, our client is requested on a recurring basis to give guidance with respect to economic conditions, including prices, in the natural gas

* Not reproduced herein. Copies of all attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

producing arm of the petroleum industry. It attempts to assemble, for its immediate use as a consultant, the latest economic data with respect to the range of prices being paid to producers of natural gas in all parts of the United States.

Because of its reputation in the foregoing area of consultant operations, our client receives numerous requests for guidance from producers of natural gas who have gas sales contracts with price redetermination clauses. Price redetermination may be triggered by several sets of circumstances anticipated by individual contracts which are non-uniform in their language. For example, the Natural Gas Policy Act of 1978 provides in Section 107 for the deregulation of the price of gas produced from zones below the depth of 15,000 feet and this deregulation occurred on November 1, 1979. Thereafter the price of such gas is not subject to a ceiling price under the Act. Natural gas sales contracts previously entered into, provide in some instances, that the price of natural gas which at any time during the tenure of the contract becomes deregulated shall be the subject of redetermination. The redetermination provisions in such contracts are not uniform in language but usually give some parameters within which the negotiations must take place, such as all pertinent economic factors, including the highest prices being paid for similar gas in a given adjoining area. Three examples of redetermination clauses are appended hereto for your reference.*

In order to be of service in such price redetermination situations, our client contemplates, in connection with its economic consultant operations, acting as a "clearing house" for pricing information in the various areas of the United States. It will assemble then-current pricing information from various sources, ranging from informal bits of casual information to data acquired from government sources such as State tax commissions and regulating agencies. In addition, it contemplates requesting existing pricing information from its private producer clients and other private industry sources. It will then, through the use of computer storage facilities and analysis capability within its existing organization, be able to provide current pricing information in the various producing fields and parts of fields within the United States. This service would be conducted and promulgated as a part of its consultant work and will be charged for on the basis of current consultant fees.

Our client's request for pricing information will be to specific producers for detailed information concerning dollar pricing, escalation features of the contract, and any other pricing structure affecting the present or future price of the natural gas under a specific contract. A request may also be included for a copy of the pricing clause of an

* Not reproduced herein. Copies of all attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

existing contract. Of course, compliance with such requests on the part of the producer would be voluntary, but we believe a need for such a clearing house of pricing information is widely recognized in the industry. In this regard, to our knowledge there is now no ready source of such information in any government agency or private or industry organization, other than a current attempt on the part of Foster Associates, Inc. of Washington, D.C., to analyse gas pricing information taken from contracts filed with the Federal Energy Regulatory Commission. It should also be noted that our client is neither a producer, seller or purchaser of natural gas or any other hydrocarbon, acting only in the capacity of consultant.

The information with respect to price divulged by our client would include the general locations of the wells where pricing data is known, and the specific existing price data, without revealing sources. The names of producer-purchaser contracting parties would not be divulged. In this regard it can be stated that there are scores of gas producers and purchasers of varied size operating in the United States and usually no concentration of any one company in a given gas producing field.

We respectfully request an advisory opinion whether the above economic consultant activity would conform to the laws and regulations administered by the Federal Trade Commission, and specifically whether, if undertaken, there would be any violation of antitrust or similar prohibitions of the Federal law. Included in the opinion we hope will be a statement not only with reference to our client's proposed operations but also with regard to the furnishing of such information to our client, for the restricted purposes above indicated, by private producer-sellers of natural gas. We would be pleased to furnish any additional information which you may need in regard to our client's proposed activities or any other natural gas industry information which you may require. Since the need for the proposed consultant service is immediate in the industry, we would respectfully request that an advisory opinion be issued at the earliest convenient time.

Respectfully submitted,

/s/ William J. Legg

Proposed use of intermediaries to collect and supply natural gas price and other data for use in contract redeterminations would be permissible, subject to certain qualifications. [*Santa Fe Energy Co., 833 0002*]

April 18, 1983

Dear Mr. De Lung and Miss Rieck:

This responds to your request for an advisory opinion concerning the use by Santa Fe Energy Company (Santa Fe) of certain firms—including the Resource Analysis & Management Group—as intermediaries to obtain price and other data from competitors for the purpose of implementing natural gas price redetermination provisions in contracts for the sale of natural gas from deregulated natural gas wells.

The Commission understands that Santa Fe is a relatively small natural gas producer owning, or having interests in, a number of natural gas wells in gas producing regions in the western and southwestern United States. The Commission further understands that Santa Fe's need for certain price and other data in order to redetermine prices for natural gas wells in accordance with various redetermination clauses is the result of the deregulation of natural gas wells which has occurred, or will take place, under present provisions of the Natural Gas Policy Act of 1978.

As you are aware, price information exchanges among competitors in particular marketing environments could raise serious antitrust concerns. In view of the Supreme Court's opinion in *United States* v. *Container Corp.,* 393 U.S. 333 (1969), the legality of Santa Fe's use of various firms to provide it with current price and other data for redetermination purposes depends upon a factual assessment of the structure and other economic characteristics of the markets involved, the nature and purpose of the plan to obtain and provide such data by the various firms, and the probable effect of the collection and dissemination of such data on natural gas prices and the interdependency of natural gas producers in such markets.

On the basis of available information indicating low concentration of natural gas production on a national basis, the availability of price information to larger producers and purchasers, and the need for reliable price adjustment mechanisms in natural gas supply contracts, the Commission presently does not see any competition problems posed by Santa Fe's proposed use of intermediaries to obtain and supply it with price and other data for redetermination purposes. The Commission cautions, however, that the program must not be used by Santa Fe, or any concern supplying redetermination data to Santa Fe,

to restrict independent business decisions by any individual firm, to secure adherence to quotas of production or sales, to facilitate joint determination of prices, or to effect any other such unlawful trade restraint. The Commission reserves the right to conduct any further investigation of the Santa Fe program as may be in the public interest based on additional information or changed circumstances which may indicate an anticompetitive purpose or effect.

Accordingly, the Commission does not presently object to the proposed use by Santa Fe of intermediaries to collect and supply it with natural gas price and other data for use in contract redeterminations, subject to the above qualifications.

By direction of the Commission.

Letter of Request

December 15, 1981

Pursuant to the applicable regulations at 16 C.F.R. 1.1 through 1.4, Santa Fe Energy Company (Santa Fe) respectfully requests an opinion from the Commission concerning the legality of employing the services of firms able to furnish composite natural gas pricing information for contract redetermination purposes.

I. BACKGROUND.

Santa Fe is an independent oil and gas production firm actively involved in exploration and development of domestic oil and gas reserves both onshore and offshore. Since enactment of the Natural Gas Policy Act (NGPA) in 1978 a majority of the natural gas contracts Santa Fe has entered contain price deregulation provisions. These provisions are included in anticipation of gradual decontrol of various categories of natural gas. The typical natural gas deregulation provision in Santa Fe's and other natural gas companies' contracts states:

If, at any time and from time to time, the price to be paid hereunder for all or a portion of the gas sold under this Agreement is not subject to federal regulation, then the price to be paid thereafter for such deregulated or nonregulated gas shall be determined for each Delivery Quarter to equal one of the following prices, which shall be selected by Seller as hereinafter provided:

A. * * *

B. The arithmetic average of the highest price per MMBTU, excluding taxes and other production related costs, paid for gas delivered in the first month of the preceding Delivery Quarter by each of two (2) interstate pipeline companies, one of which may be Buyer, for gas produced within the county or counties in which the gas subject to this Agreement is produced. The contracts used in determining such two (2) highest prices shall cover wells that were producing during the first month of the preceding Delivery Quarter and shall have been entered into between nonaffiliated buyers and sellers during the twenty-four (24) month period immediately preceding the effective

date of the redetermined price hereunder pertaining to gas of substantially the same quantity and quality and delivered under terms and conditions comparable to this Agreement. The arithmetic average of such two (2) highest prices, together with supporting calculations and data and copies of either the contracts involved or other documentary evidence satisfactory to Buyer utilized by Seller in calculating such average price, shall be furnished to Buyer prior to the commencement of each Delivery Quarter in which this method of determining the price remains in effect. If such documentary evidence is not timely received by Buyer, the price payable hereunder during such Delivery Quarter shall be the higher of the prices as determined by either A., C., or D. of this 3. In no event shall the price determined in accordance with this B. exceed 1.3 times the MMBTU price for Fuel Oil No. 2, as determined in accordance with the provisions of C. of this 3.; . . . .

The quoted contract provision is taken from Santa Fe's contract with El Paso Natural Gas Company dated February 20, 1981 covering a well in Roger Mills County, Oklahoma.[1] The purpose of such a provision is to establish the fair market value of like quality gas being sold under similar contract conditions.

II. EXPLANATION OF SANTA FE'S QUESTION.

Santa Fe respectfully requests an opinion from the Commission whether, in exercising the option to receive natural gas prices equal to "the average of the three highest prices being paid under contracts by other pipeline companies" or similarly worded pricing options, it may employ the services of a firm which provides information regarding prices being paid by pipelines buying gas of similar quality and quantity. In particular, Santa Fe requests advice whether it may employ the services of the Resource Analysis and Management Group (RAM Group), an Oklahoma City, Oklahoma firm, to determine fair market value for deregulated natural gas being sold to El Paso under the quoted contract. The RAM Group publicizes itself as follows:

The RAM Group is a consulting firm in the energy field offering special services to operators and producers in the oil and gas business. As a part of this service, the RAM Group assists companies in their compliance with policies and regulations of the Federal Energy Regulatory Commission. Also, the RAM Group assists companies in the management of energy related business transactions including the establishment of prices permitted under existing contracts.

The RAM Group has represented to Santa Fe orally and in its correspondence that it obtains comparative pricing information by reviewing "public records, commercial sources and proprietary information available to the RAM Group" to identify the highest prices being paid

[1] See Appendix A, attached, for the complete text of the pricing provisions of Article IX, Sections 1 through 3, under the quoted contract between Santa Fe and El Paso Natural Gas Company. [Not reproduced herein. Copies of all attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.]

for gas of similar quantity and quality, thereby establishing fair market value of such gas as nearly as possible.

III. THE LAW UNDER WHICH THE QUESTION ARISES.

The question posed by Santa Fe arises under the Sherman Antitrust Act and the Clayton Act, 15 U.S.C. 1–7 and 12–27. Santa Fe's request for advice is essentially a request for an opinion from the Commission whether the use of services provided by the RAM Group or similar firms in other states violates either the letter or the spirit of the antitrust laws.

IV. ADDITIONAL MATERIAL FACTS.

In addition to the foregoing explanation of facts and issues, Santa Fe emphasizes that the RAM Group is a professional organization and its services are available to the public. Two possible exceptions to this general rule are (1) where a potential client is unable to pay for the services and (2) where a potential client would place the RAM Group in a conflict of interest in serving another client. Also, it should be pointed out that although many of Santa Fe's contracts contain deregulation provisions similar to that quoted above, not all contracts provide a choice of options for price redetermination. Instead, many contracts contain the "average of the three highest prices being paid" as the sole means of redetermining price in the event of deregulation. Therefore, Santa Fe must be able to confirm prices being paid by employing the services of a firm such as the RAM Group.

IV. IDENTITY OF THE COMPANIES INVOLVED.

(1) Santa Fe Energy Company
1616 S. Voss Street
Houston, Texas 77057

(2) Resource Analysis and Management Group
First National Center
Oklahoma City, Oklahoma 73102

In addition to the foregoing companies, Santa Fe asserts that many similarly situated natural gas producers are facing the dilemma posed by this request for advice with increasing frequency and severity of impact as more natural gas becomes deregulated. It is noteworthy that probably the only companies not experiencing difficulty are major natural gas companies which have pipeline affiliates. These companies are able to obtain price information through their pipeline affiliates without resort to the services of a firm such as RAM Group.

V. CONCLUSION.

Santa Fe is faced with the prospect of price renegotiation for several contracts, including the El Paso contract quoted above, within the upcoming calendar quarter. Therefore, the Commission's advice on the matter raised herein will have an immediate and direct impact. Santa Fe respectfully requests the Commission's advice at the earliest possible date.

Respectfully submitted.

/s/ Harry L. De Lung, Jr.
/s/ Ann Straw Rieck

Peer review by organization's participating physicians of health care services provided under health benefits plans involving private employers and insurers rather than under governmental programs would not violate Section 5 of the Federal Trade Commission Act. [*Rhode Island Professional Standards Review Organization, 833 0004*]

May 9, 1983

Dear Mr. Lynch:

This is in response to your request for an advisory opinion concerning a proposed program for private peer review to be undertaken by the Rhode Island Professional Standards Review Organization ("RIPSRO"). By letter of January 5, 1983, you asked the Bureau of Competition whether RIPSRO and its participating physicians would violate the antitrust laws by performing peer review for private employers' health benefits programs. You clarified your request by telephone with Bureau of Competition Assistant Director Arthur N. Lerner, sending supplemental materials to him, including a draft of the contract to be used in the program. Since your request raises an issue of significant public interest, under Section 1.1 of the Commission's Rules of Practice an advisory opinion from the Commission itself, rather than from the Bureau of Competition, is warranted.

Based on the information provided, the Commission understands that RIPSRO is a nonprofit organization of physicians in Rhode Island that intends to perform certain services as part of its private peer review program "to assure that only medically necessary care is provided and that this care meets professionally recognized standards of quality." Services RIPSRO will perform under the program include: 1) preadmission review of hospital admissions for elective surgery; 2) concurrent review of in-hospital health services, including certification or non-certification of admissions, assignment of recommended appropriate length of stay, and periodic recommendation concerning continued stay; 3) retrospective review of certain hospital admissions; 4) monitoring of hospital discharge planning; and 5) quality review studies. The Commission also understands that RIPSRO has no current plans to perform any fee review under this program.

According to your submission, determinations made by RIPSRO through its reviewing physicians and registered nurses will be advisory in nature. RIPSRO has no legal or contractual authority to bind any party—including the contracting employer, insurer, health care provider, or beneficiary—concerning its determinations. Final decision regarding payment of all health care benefit claims will rest with the employer and/or the applicable insurer.

In considering your request, the Commission has reviewed the Supreme Court's recent ruling in *Union Labor Life Insurance Co. v. Pireno*, __ U.S. __, 102 S.Ct. 3002 (1982). The professional peer review activities in that case were held not to be exempt from the antitrust laws as part of the "business of insurance." The Commission also has considered the recently enacted federal Peer Review Improvements Act of 1982, which facilitates private peer review, even mandating it in certain circumstances. Although there is no direct judicial precedent on the legality under the antitrust laws of a peer review program such as the one you have proposed, the Commission has taken into account both its advisory opinion letter of April 8, 1982 on fee review to the Iowa Dental Association [*see* 99 F.T.C. 648] and the business review letter of March 2, 1977 from the Department of Justice, indicating that it did not intend to oppose under the antitrust laws the operation of peer review committees by the International Chiropractors Association.

Based on the Commission's review of your proposed peer review program, the Commission is of the opinion that operation of the program as described would not violate Section 5 of the Federal Trade Commission Act or any other provision of law the Federal Trade Commission enforces. The program does not appear to involve any price-fixing, concerted refusal to deal, agreement not to compete, or other conspiracy in restraint of trade. The program could, in fact, promote competition, thereby providing substantial benefits to consumers. Contracting insurers and employers can use the information generated by RIPSRO's peer review program in deciding whether to pay for medical care in particular instances, and consumers can use this information in deciding whether to receive or "purchase" medical care. To the extent that the peer review program helps participating prepaid health care plans reduce costs, it also will increase the competitive incentives for other third-party payers to participate in effective cost-containment programs. In addition, RIPSRO's peer review program can help health care providers practice in a cost-conscious manner, and give them greater incentive to do so.

This advisory opinion, like all those the Commission issues, is limited to the proposed conduct your submission describes. Thus, as noted in the Commission's opinion letter concerning the Iowa Dental Association's fee review program, ". . . great care must continually be taken in carrying out the program to assure that its purpose remains legitimate and that it does not produce significant anticompetitive effects and thereby run afoul of the antitrust laws." You should, for example, avoid any misuse of the peer review program to discriminate against innovative competitors whose practices, although legitimate and appropriate, may pose a competitive threat to other physicians involved in the peer review program.

Finally, the Commission retains the right to reconsider the questions involved and, with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion if implementation of the proposed peer review program results in anticompetitive effects, if the program is used for improper purposes, or if the public interest otherwise so requires.

By direction of the Commission.

Letter of Request

January 5, 1983

Dear Mr. Campbell:

As you know, peer review groups have been operating under the federal statute, Section 249 F, Public Law 92–603, since 1972. Then, in the last Congress, as a rider to the Tax Equity and Fiscal Responsibility Act of 1982, Senator Durenberger submitted the Peer Review Improvement Act which was signed into law on September 3, 1982 along with the other provisions of the Tax Equity and Fiscal Responsibility Act.

I note, again, some comments in the *Employee Benefit Plan Review* magazine of December, 1982 that Mr. Miller has suggested that the FTC would give an opinion regarding possible antitrust implications.

As a peer review organization and following the initiative of the federal law, that is, the Peer Review Improvement Act of 1982, we now would like to enter into private review arrangements with large corporations, small businesses, cities and towns, unions, and other groups that would be interested in eradicating overutilization and waste in the health care system for their hospitalized employees. Since we are undertaking this task right now with the possibility of developing a business coalition in the State of Rhode Island, we wonder what the FTC's opinion would be in terms of antitrust implications if our physicians became involved in making specific denials of services and days for hospitalized patients in the private review sector.

We believe that the physicians in our organization, who have undertaken the task to review medical necessity, appropriateness, and quality of care since the adoption of the PSRO statute, have acquitted themselves with high distinction in the public's interest.

We feel that any adverse decisions by the FTC regarding PSRO review or PRO review would not be in the interest of the nation. We, especially, believe that with the initiative of the Senate Finance Committee in approving unanimously the Peer Review Improvement Act of 1982, the extension of such review into the private sector with

corporations directly or through business coalitions is certainly in the interest of assuring quality of care for the American people while, at the same time, eradicating waste and overutilization.

Would you give us an opinion regarding antitrust implications for physicians participating in our program as we move forward in the 80's to extend our review into the private sector?

Thank you for your attention to this matter. With best wishes, I am

Sincerely yours,

/s/ Edward J. Lynch
Executive Vice President

Proposed health care delivery program that restricts participation to a limited number of doctors and emphasizes lowering costs would not violate federal antitrust laws. [*Health Care Management Associates, 833 0005*]

June 7, 1983

Dear Dr. Smith:

This letter responds to your request for an advisory opinion concerning a proposed "Cooperating Provider Program" ("CPP") by Health Care Management Associates ("HCMA") for the organization, financing, and delivery of health care services. HCMA is a private, for-profit firm incorporated under the laws of the State of New Jersey. Its purpose is "to provide professional consulting and administrative services in order to promote cost-containment in the health care industry." You also have informed us that "no actively practicing provider, hospital, payer (employer or insurer) has any direct or indirect financial, controlling, or non-controlling interest in HCMA."

The Commission understands that HCMA wishes to establish and operate the Cooperating Provider Program "to promote competition . . . by encouraging the awareness of cost [of health care] on the part of the user and to 'pressure' individual physicians, hospitals and other PPOs [preferred provider organizations] to be cost competitive. . . ." The Cooperating Provider Program is a variation on the so-called "preferred provider organization," or "PPO," with HCMA serving as the intermediary between health care providers wishing to "sell" their services and third-party payers[1] wishing to "purchase" those providers' services on behalf of their insureds or beneficiaries.

HCMA intends to contract individually with health care providers such as allopathic and osteopathic physicians, podiatrists, oral surgeons, clinical psychologists, and possibly also optometrists, dentists, nurse midwives, and physical therapists. HCMA will not enter into cooperating provider agreements with any groups or organizations of independently practicing competing providers; it may enter into such agreements with integrated group practices, professional partnerships, and institutions employing salaried professional staff. "Cooperating providers" will agree to provide health care services to insureds or beneficiaries covered by third-party payers that contract with HCMA to offer the Cooperating Provider Program. Cooperating providers will total not more than 10–15 percent of all local area providers, with this participation rate relatively uniform across specialties.

[1] Third-party payers, such as insurance companies, service benefit companies or employers, are entities that either reimburse patients for all or part of the cost of medical and health care services or make direct payments to providers of those services on behalf of patients.

Cooperating providers will have a choice between two methods of reimbursement determined by HCMA: 1) the lesser of the charges submitted by the cooperating provider or a maximum payment schedule for services determined by HCMA; or 2) the cooperating provider's "usual, customary and reasonable" fee for the service, less a percentage discount (up to a maximum of 15 percent) as set forth in the third-party payer's contract with HCMA. Each cooperating provider will decide independently whether to contract with HCMA and will continue to set his or her charges for services independent of any other cooperating providers. Nothing in the Cooperating Provider Program or the cooperating provider agreement will affect the charges that a cooperating provider may make to patients not covered by the Cooperating Provider Program. Reimbursement to a cooperating provider under the Cooperating Provider Program for services covered by the program will constitute payment in full to the cooperating provider.

HCMA will prepare and periodically update a directory of "cooperating providers" for distribution to persons covered by third-party payers under the Cooperating Provider Program. Third-party payers using the Cooperating Provider Program will incorporate in their coverage provisions certain financial incentives for persons covered under the Cooperating Provider Program to encourage use of the services of cooperating providers. Beneficiaries remain free, however, to obtain covered services from providers who are not "cooperating providers," albeit at the cost of incurring some additional, out-of-pocket expense that would not exist if a cooperating provider were used.

HCMA will negotiate contracts for Cooperating Provider Program services with third-party payers, such as commercial insurance carriers and self-funded or self-insured employer groups. These payers make all claims payments, and underwrite any insurance risk. HCMA does not act as an insurer in the Cooperating Provider Program. HCMA also will provide utilization review and quality assurance services under the Cooperating Provider Program. As payment for its services, HCMA will receive an annual fee negotiated with each third-party payer. Cooperating providers will make no payment to HCMA, although a "nominal annual membership fee" may be initiated at a later date.

HCMA plans to market the Cooperating Provider Program initially in Burlington, Camden, and Gloucester Counties of New Jersey, with possible expansion to adjacent counties in the future. The primary market for the Cooperating Provider Program consists of those persons in this geographic area who are covered under commercial and self-insurance programs, estimated to be approximately 30 percent of the total employed population of the area.

Nothing in the program prohibits or limits participating providers from contracting with or participating in the programs of any other PPO, HMO, or other third-party payer. Similarly, third-party payers participating in the Cooperating Provider Program remain free to engage in other programs.

The proposed Cooperating Provider Program, in essence, would be a form of vertical arrangement between individual sellers of services (cooperating providers) and purchasers of services (third-party payers, on behalf of their insureds or beneficiaries) for the sale and purchase of health care services. HCMA proposes to facilitate these transactions by performing certain functions much like an agent or broker. HCMA is not itself a primary party to the underlying transaction. Also, the Cooperating Provider Program involves no agreements among either competing providers or third-party payers concerning any aspect of their involvement in the program.

Based on the description of the Cooperating Provider Program outlined above and further detailed in your submissions, it is the Commission's opinion that operation of the program would not constitute a horizontal or vertical price fixing arrangement or an unlawful joint sales agency arrangement. Nor does the Cooperating Provider Program, as described, raise a colorable claim of boycott or concerted refusal to deal under the antitrust laws. Finally, the program, as described, contains no suggestion of a specific intent to monopolize, nor does HCMA appear to be capable of acquiring, maintaining, or improperly using monopoly power. It appears, moreover, that the Cooperating Provider Program proposed by HCMA is likely to be procompetitive, both by generating competition between cooperating providers and other local providers and by increasing competition among third-party payers. It is the Commission's opinion that this program would not violate the Federal Trade Commission Act or any provision of antitrust law the Commission enforces.[2]

The Commission retains the right to reconsider the questions involved, and to rescind or revoke its opinion with notice to the requesting party in accordance with Section 1.3(b) of the Rules of Practice, if the implementation of the Cooperating Provider Program results in anticompetitive effects, the purposes of the program no longer remain legitimate, or the public interest otherwise so requires.

By direction of the Commission.

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[2] This Advisory Opinion, like all those the Commission issues, is limited to the proposed conduct described in the request being considered. Therefore, it does not constitute approval for actions that are different from those described, or those not specified, in the request. Nor does this Advisory Opinion conclude or imply that to avoid illegality under the antitrust laws a PPO must be structured and operated in every respect like HCMA's Cooperating Provider Program.

Letter of Request

October 12, 1982

Dear Mr. Pollard,

I would like to express my appreciation for the time you spent with me on the telephone discussing Preferred Provider Organizations. As you recommended, I am writing to request a staff opinion letter concerning the possible antitrust liability for Health Care Management Associates (HCMA) and/or its cooperating physicians and other clinical professionals with respect to the proposed Cooperating Provider Program (CPP) which is described in the enclosed information.

I believe that, rather than hindering competition, the proposed CPP is one expression of the high level of competition which already exists in the service area. Furthermore, it can be expected to generate other competitive responses. Moreover, the structure and operation of the CPP is clearly designed with the objective to increase the competitive environment as follows:

- The maximum number of cooperating providers in the CPP is projected to be approximately 10–15% of the actively practicing providers in the service area.
- The cooperating providers will represent all specialties without an undue or disproportionate concentration in any one clinical area.
- The primary market for the CPP is those employed persons covered by self-funded or commercial insurance health programs. This market is only approximately 30% of all employed persons residing in the service area.
- HCMA, which is a private independent entity neither sponsored nor controlled by any provider group or payer, will, in effect, be the broker for the cooperating providers with interested payers in establishing the CPP.
- Although there are no CPPs currently in the service area, there is one operational HMO and a second one in development. However, more significantly, the local health care environment demonstrates growing competition among institutional and professional providers.

I would appreciate your timely review of this material and look forward to receiving your opinion as soon as feasible. If I can provide further information or clarification, please let me know.

Sincerely,

/s/ Irwin S. Smith, M.D.
President

Proposed code of ethics concerning various aspects of professional conduct by ophthalmologists would not violate federal laws. [*American Academy of Ophthalmology, 833 0006*]

June 17, 1983

Dear Mr. Jacobs:

This letter responds to your request for an advisory opinion concerning the proposed code of ethics of the American Academy of Ophthalmology. The Academy, an organization of physicians specializing in medical and surgical care of the eye, intends to adopt a code of ethics to govern the professional conduct of its members. This code would become part of the Academy's bylaws, to which ophthalmologists agree to subscribe when they join the organization. You have requested that the Commission advise the Academy whether the proposed code of ethics[1] complies with Section 5 of the Federal Trade Commission Act and all other applicable statutes administered or enforced by the Commission.

The laws enforced by the Commission do not prohibit professional associations from adopting reasonable ethical codes designed to protect the public. Such self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare. In some instances, however, particular ethical restrictions can unreasonably restrict competition and thereby violate the antitrust laws.

The legality of a professional society's ethical rules under the antitrust laws depends upon their purposes and competitive effects.[2] The materials accompanying your request state that the purpose of the proposed code of ethics is "exclusively to protect and benefit patients of ophthalmologists who are members of the Academy." In accordance with its customary practice when considering advisory opinion requests, the Commission has relied upon the Academy's statement as to the good faith purpose of the code. Thus, the Commission has focused its attention on the probable effects on competition of the various provisions contained in the Academy's proposed code of ethics.

The Academy's proposed code of ethics contains three sections: (1) "Principles of Ethics," which are aspirational guidelines for professional conduct and are not enforceable; (2) "Rules of Ethics," which establish specific enforceable standards of conduct for members of the Academy; and (3) "Administrative Procedures," which set forth the structure and operations of the Academy's Ethics Committee and the

[1] Submitted on August 31, 1982 and modified by your submission on January 17, 1983.

[2] *See National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 452 U.S. 960 (1982).

procedures for investigative and disciplinary proceedings concerning ethics complaints. Members found to have violated the rules of ethics may be reprimanded, suspended from the Academy for a definite time period, or permanently expelled.

The ethical principles express the Academy's views regarding the duties of an ethical ophthalmologist. They state, for example, that ophthalmological services must be provided with compassion and integrity, competence must be maintained through continued study, confidentiality of patient communications must be respected, fees should not exploit patients or others, ophthalmologists deficient in character should be reported to the proper authorities, and the patient's welfare must be the ophthalmologist's primary consideration. The Commission does not find any significant threat to competition posed by these proposed guidelines. It is the Commission's opinion that adoption of the proposed "Principles of Ethics" for the purpose described by the Academy would not violate the Federal Trade Commission Act or any other statute enforced by the Commission.

The second section of the code contains the ethical rules, which the Academy intends to enforce. As their titles indicate, these rules address various aspects of professional conduct:

A. Competence
B. Informed Consent
C. Clinical Experiments and Investigative Procedures
D. Other Opinions
E. The Impaired Ophthalmologist
F. Preoperative Assessment
G. Delegation of Services
H. Postoperative Care
I. Medical and Surgical Procedures
J. Procedures and Materials
K. Commercial Relationships
L. Communications to Colleagues
M. Communications to the Public

Most of these rules do not raise significant antitrust issues. For example, the Academy has proposed rules that would assure to patients such important protections as informed consent, careful preoperative evaluations, and appropriate consultations. Other ethical rules in the proposed code prohibit practices that cause injury to patients, such as misrepresentations of services performed or the ordering of unnecessary procedures for pecuniary gain. Such rules appear unlikely to have anticompetitive effects and may, in some instances, promote competition.

A few of the ethical rules—because of the nature of the restraints that they impose—require separate discussion. These are the provisions addressing clinical experiments and investigative procedures,

delegation of ophthalmological services, postoperative care, and communications to the public.

Clinical Experiments and Investigative Procedures

Rule C of the Academy's proposed code requires ophthalmologists to obtain approval from "adequate review mechanisms" before undertaking a "clinical experiment" or an "investigative procedure." The ophthalmological procedures subject to this requirement are defined in the rule as "those conducted to develop adequate information on which to base prognostic or therapeutic decisions, or to determine etiology or pathogenesis, in circumstances in which insufficient information exists." The rule does not require a particular type of review mechanism for all cases. In supplemental materials, the Academy has indicated that the concept of an "adequate" review mechanism is intended to be flexible, and that the rule has been drafted to permit use of "informal" review mechanisms, such as a telephone conference with a colleague, when formal review would be impracticable. The rule also provides that informed consent for clinical experiments and investigative procedures "must recognize their special nature and ramifications."

Although unnecessarily strict controls on the use of new ophthalmological procedures could unreasonably restrict competition and innovation, the Academy's proposed rule appears to provide safeguards to patients—to protect them from uncontrolled experimentation—with no apparent lessening of competition. Serious antitrust concerns would be raised, of course, should the rule be applied in a discriminatory manner to discourage vigorous and innovative competitors or be otherwise abused in an attempt to restrain legitimate competition.

Delegation of Services

Rule G addresses delegation of eye care services. This rule declares that certain eye care services may not be delegated to nonphysician health care professionals (referred to by the Academy in its rule as "auxiliary health care personnel"). Under the rule, non-delegable services are "those aspects of eye care within the unique competence of the ophthalmologist (which do not include those permitted by law to be performed by auxiliaries)." Materials accompanying your request* state that the term "auxiliaries" as used in the code includes optometrists, nurses, technicians, orthoptists and others. Rule G further provides that when an opthalmologist maintains responsibility to the patient for eye care services not "within the unique competence

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of the ophthalmologist," these services may be delegated to qualified non-physician health care professionals with adequate supervision.

Rule G addresses practice arrangements between ophthalmologists and non-physician health care professionals, and does not apply to arrangements between ophthalmologists and other physicians, since physicians are not "auxiliaries." The Commission understands that the rule would not prevent ophthalmologists from making arrangements for delegation of eye care services to non-physicians as long as those arrangements are structured and carried out in accordance with applicable state law. State laws regulating health care professionals permit those non-physicians that the Academy has described as "auxiliaries" to provide a variety of eye care services, sometimes as independent practitioners and in other cases under the supervision of a licensed physician. Under the code, such services are not "within the unique competence of the ophthalmologist," and therefore they may be delegated.

It is also the Commission's understanding that the supervision requirement contained in the rule, applicable when an ophthalmologist retains responsibility for eye care that may be delegated, is not intended to mandate a particular type or degree of supervision for all situations. Supervision requirements under state law vary greatly, and may range from direct, on-site supervision to practice under standing orders or telephone consultation. The Academy has indicated in supplementary materials provided to the Commission* that the level of supervision required by the rule will be determined by reference to applicable state law. Finally, the Academy has specifically provided for flexibility in Rule G by the last sentence of the rule, which states: "An ophthalmologist may make different arrangements for the delegation of eye care in special circumstances, such as emergencies, if the patient's welfare and rights are placed above all other considerations."

Serious antitrust concerns would, of course, be raised by an ethical rule that unreasonably interfered with legitimate competition by ophthalmologists working in conjunction with non-physician health care professionals, or prevented optometrists or others from providing services that they are legally and professionally qualified to provide. It is the Commission's opinion, though, based on its understanding set forth above and the Academy's supplemental assurances and explanations, that Rule G should not have these effects.

Postoperative Care

Rule H addresses arrangements for care following eye surgery. Like Rule G, it concerns aspects of eye care—in this particular rule postop-

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erative eye care—that are "within the unique competence of the ophthalmologist (which do not include those permitted by law to be performed by auxiliaries)." Rule H declares that those aspects of postoperative eye care must be provided either by the operating ophthalmologist or by another ophthalmologist with whom a referral arrangement has been made. It is the Commission's understanding that the Academy prefers that the operating ophthalmologist provide the aspects of postoperative care covered by Rule H, but that, nonetheless, the code has been drafted to leave Academy members free to refer patients to another ophthalmologist for this postoperative care.

The rule also provides that when a patient is referred for postoperative care, the operating ophthalmologist must make the arrangements before surgery, and the patient and the other ophthalmologist must agree. The rule further declares that fees for postoperative care should reflect the arrangements that have been made, "with advance disclosure to the patient." Finally, Rule H states that "different arrangements" for postoperative eye care may be made in emergencies or other special circumstances, as long as the patient's welfare and rights are the primary consideration. Explanatory materials accompanying your request* state that special circumstances include, for example, cases in which no ophthalmologist is available to perform the postoperative care in the geographic area where the patient resides.

Rule H addresses aspects of postoperative eye care falling within the range of services that only physicians are qualified by law to perform. For example, the rule would not prevent ophthalmologists from arranging for optometrists to provide postoperative eye care services consistent with state law. It appears, however, that the rule could affect postoperative care arrangements with physicians who are not ophthalmologists. The question arises whether Rule H's identification of some postoperative eye care services as "within the unique competence of the ophthalmologist" might unreasonably prevent Academy members from referring patients to qualified physicians who are not specialists in ophthalmology, either individual private practitioners or those in health maintenance organizations and other group settings.

Agreements among competitors to exclude another group of competitors from a market are highly suspect under the antitrust laws. Thus, if Rule H were a strict prohibition that had the effect of categorically excluding non-ophthalmologist physicians from some aspects of medical practice, it might raise serious antitrust questions. It is the Commission's understanding, however, that the Academy has

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endeavored to provide for flexibility in Rule H. One example of this flexibility is the last sentence of the rule, which provides for other referral arrangements in "special circumstances." Another area of flexibility involves the determination of what eye care functions are unique to ophthalmology.

The Commission understands that it is the Academy's position that the precise eye care functions deemed to be "within the unique competence of the ophthalmologist" will vary depending upon the circumstances involved. Although the proposed code defines an "ophthalmologist" as "a physician who is educated and trained to provide medical and surgical care of the eyes and related structures," state statutes and regulations do not define areas of medical specialization, such as ophthalmology, and thus do not delineate an area of medicine that might be considered "within the unique competence of the ophthalmologist." Moreover, the Academy states in its explanatory materials submitted with the proposed code* that it is not seeking through its code of ethics to define the appropriate scope of practice of health care personnel. Rather, these supplementary materials set forth a flexible approach, and state that in determining what eye care services fall within the special sphere of the ophthalmologist, the Academy will look to "the circumstances of each situation" and "whatever governing mandatory or voluntary credentialing mechanisms might exist." Thus, as the Commission understands it, Rule H would not preclude an Academy member from referring patients to a non-ophthalmological specialist for postoperative eye care, as long as the individual physician's training and experience qualified him or her to provide the particular postoperative services.

In light of this flexibility, the Commission concludes that Rule H is a reasonable rule that could provide valuable protection to consumers. As long as it is applied fairly and objectively, and is not interpreted more broadly than necessary to achieve its legitimate goal, it should not unreasonably impair competition. Careful attention will have to be paid to interpretation and enforcement of Rule H, because the lack of any clear definition for "aspects of eye care within the unique competence of the ophthalmologist" may make the rule susceptible to abuses in application. Obviously, if the effect of the rule were to impede new and potentially cost-effective methods for the delivery of quality eye care or to exclude unreasonably family physicians or other doctors from certain aspects of medical practice, serious antitrust concerns would be raised. Nonetheless, based on the available information, it appears that adoption of Rule H would not pose an unlawful threat to competition or consumer welfare.

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Communications to the Public

Rule M sets forth several requirements for advertising and other communications to the public. The rule bans false or deceptive communications, both affirmative misrepresentations and misrepresentations arising from the failure to disclose a material fact. It does not ban any particular form of communication, such as testimonials or pictorial representations; rather, it provides that these and other forms of communications must not convey false or deceptive information.

Rule M also prohibits certain specific types of representations. The rule bans communications that: "appeal to an individual's anxiety in an excessive or unfair way"; "create unjustified expectations of results"; "misrepresent an ophthalmologist's credentials, training, experience or ability"; or "contain material claims of superiority that cannot be substantiated."

These provisions elaborate on the rule's general proscription of false or deceptive communications. With respect to appeals to anxiety, the Academy has taken into account the fact that information on health care topics may often create anxiety and has drafted the rule to make clear that it is aimed at those communications that unfairly or oppressively cause anxiety. The Commission understands that this provision will be enforced reasonably and objectively, to avoid discouraging the dissemination of valuable information to consumers. The ban on communications that "create unjustified expectations of results" prohibits deceptive representations regarding the likely results of ophthalmological treatment. The last two provisions identified above address false or misleading statements about the qualifications of an ophthalmologist. The Commission notes that the rule prohibits "material claims of superiority that cannot be substantiated" and does not contain a ban on "self-laudatory" or "self-aggrandizing" statements.

Finally, Rule M contains two disclosure requirements. Disclosures regarding safety, efficacy, and the availability of alternatives must be made if a communication refers to "benefits or other attributes of ophthalmic procedures or products that involve significant risks," and in some cases descriptions or assessments of alternative treatments must be given. In addition, a communication must include a disclosure that it "results from payment by an ophthalmologist," when this is the case and it is not obvious from the nature, format, or medium of the communication.

The Commission understands that all of the disclosures identified in the rule are required only when necessary to avoid deception. The Academy has specifically represented that the disclosure requirements with respect to communications that "refer to benefits or other attributes of ophthalmic procedures or products that involve signifi-

cant risks" are intended and will be construed by the Academy to require disclosures only to the extent necessary to prevent deception of the public. The Commission also understands that mere identification of an ophthalmic procedure or product that involves significant risks, without reference to its benefits or other qualitative attributes, will not trigger the disclosure requirement. Furthermore, the Academy has represented that an advertisement for routine eye examinations, such as "safeguard your health; get your eyes checked; careful and thorough eye examinations by appointment," would not need to contain the disclosures identified in Rule M. Similarly, the disclosure requirements of the rule would not be triggered by a communication that advertised the fitting or provision of contact lenses and noted such attributes as improved appearance, user comfort, or inexpensiveness.

Based on its understanding of Rule M and the Academy's supplemental assurances and explanations, the Commission believes that this rule does not pose an unreasonable threat to competition or consumers. Rules that are tailored to prevent false or deceptive advertising serve to enhance the competitive process and provide valuable consumer protection. Care should be exercised, of course, to ensure that interpretation and enforcement of the rule does not have the effect of suppressing nondeceptive advertising or other communications to the public.

It is the Commission's opinion, based on the foregoing and the Academy's supplemental assurances and explanations, that adoption of the proposed "Rules of Ethics" would not violate the Federal Trade Commission Act or any other laws enforced by the Commission. The Commission notes that the Academy has stated that its aim is to "assure that the code is interpreted and enforced objectively and with fairness." This is essential, for even the most carefully drafted ethical rules can create antitrust problems if they are abused. Rule K, for example, declares that an ophthalmologist must not let his or her clinical judgment and practice be affected by commercial interests. This rule could raise serious concerns if it were broadly interpreted to effect a flat ban on certain types of legitimate commercial relationships.

The final section of the proposed code of ethics describes the administrative procedures that will be used to implement the ethical rules. The procedures established by the code include: notice to the accused of the existence of an investigation; opportunity for a hearing; right to counsel; opportunity to cross-examine witnesses and offer evidence; right to appeal an adverse decision; and preservation of a written record.

Courts have held that when membership in an organization of competing firms or individuals confers a significant competitive advan-

tage, disciplinary measures such as suspension or termination may not be imposed without adequate procedural safeguards. The proposed code provides significant procedural safeguards. It is the Commission's opinion that adoption and use of the "Administrative Procedures" contained in the proposed code would not violate the antitrust laws or any other laws enforced by the Commission.

Accordingly, the Commission concludes that adoption of the American Academy of Ophthalmology's proposed code of ethics would not violate Section 5 of the Federal Trade Commission Act or any other statute enforced by the Commission. This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. It does not, of course, constitute approval for specific instances of implementation of the code that may become the subject of litigation before the Commission or any court, since interpretations and enforcement of the code in particular situations may prove to cause significant injury to competition and consumers, and thereby violate the Federal Trade Commission Act. The Commission maintains the right to reconsider the questions involved and, with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion in the event that implementation of the proposed code of ethics results in significant anticompetitive effects, should the purposes of the code or any of its individual provisions be found not to be legitimate, or should the public interest otherwise so require.

By direction of the Commission.

Letter of Request

August 31, 1983

Dear Mr. Thomas:

This is a request that the Federal Trade Commission issue an advisory opinion with respect to compliance by the proposed Code of Ethics of the American Academy of Ophthalmology with Section 5 of the Federal Trade Commission Act.

The Academy's request involves substantial questions for which there are no clear Commission or court precedents. The request and consequent publication of Commission advice is of significant public interest.

This advisory opinion request is submitted under the Commission's General Procedures, Section 1.1 and following; it is subject to enactment of legislation that may affect Commission authority with respect to the Academy.

Submitted with the request are these attachments.*

1. The Proposed Code of Ethics of the American Academy of Ophthalmology;
2. Background on the Proposed Academy Code of Ethics; and
3. The First, Second and Third Reports on Revisions to the Proposed Code.

The Academy respectfully requests an expedited response to its request. The membership of the Academy will consider the proposed Code at its annual meeting beginning October 30, 1982. The Academy would appreciate receiving a final Commission response to this request by that date.

Very truly yours,

Leighton Conklin Lemov Jacobs
and Buckley

/s/ Jerald A. Jacobs

Supplement to Request for Advisory Opinion

January 14, 1983

Dear Mr. Thomas:

This supplements a request, submitted on August 31, 1982, that the Federal Trade Commission issue an advisory opinion with respect to compliance by the proposed Code of Ethics of the American Academy of Ophthalmology with Section 5 of the Federal Trade Commission Act.

This supplement results from communications that have occurred between representatives of the American Academy and Commission staff since the advisory opinion request was submitted.

1. The Academy's August 31 request seeks an advisory opinion as to compliance by its proposed Code of Ethics with Section 5 of the Federal Trade Commission Act. By this supplement, the Academy modifies its request to seek an advisory opinion as to compliance by that Code with Section 5 of the Federal Trade Commission Act *and all other applicable statutes administered or enforced by the Commission.*

2. In Part II, the Rules of Ethics, of the Academy's proposed Code,

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included in Attachment 1 of the August 31 request,* Rule C concerns "Clinical Investigative Procedures." It requires approval by "adequate review mechanisms" for ophthalmic procedures that are "investigative." FTC staff have suggested that the rule provide further information for use by Academy members in identifying what procedures are to be considered investigative and therefore subject to review mechanisms. The Academy has added explanatory information to the rule. The denomination of the rule has been changed to "Clinical Experiments and Investigative Procedures." A sentence has been added to the rule as follows: *"Clinical experiments and investigative procedures are those conducted to develop adequate information on which to base prognostic or therapeutic decisions, or to determine etiology or pathogenesis, in circumstances in which insufficient information exists."* These changes clarify that the determination whether an ophthalmic procedure is subject to this provision, in the absence of a binding determination by an entity in authority (such as a hospital board or a government agency), depends upon the extent to which reliable information regarding the procedure is available.

3. Rule G of the Rules of Ethics concerns "Postoperative Care" and Rule H concerns "Delegation of Ophthalmological Services."

The Academy has reversed the order of these two rules to emphasize that the delegation provisions (now in Rule G) are of broader scope than the postoperative care provisions (now in Rule H).

The rule on "Delegation of Ophthalmological Services" is intended to declare, in the interest of patient protection, that eye care functions which are unique to the ophthalmologist must ordinarily be performed only by an ophthalmologist and that, when other aspects of eye care are delegated by an ophthalmologist to an auxiliary, the auxiliary must be trained and supervised.

The Academy has revised the rule on delegation in the light of FTC staff suggestions.

A definition of "delegation" is now provided for clarification—*"Delegation is the use of auxiliary health care personnel to provide eye care services for which the ophthalmologist is responsible."* And the main dictate of the rule has been rewritten to declare: *"An ophthalmologist must not delegate to an auxiliary those aspects of eye care within the unique competence of the ophthalmologist (which do not include those permitted by law to be performed by auxiliaries). When other aspects of eye care for which the ophthalmologist is responsible are delegated to an auxiliary, the auxiliary must be qualified and adequately supervised."*

Earlier in the proposed Rules of Ethics, under the subject "Competence," it is stated that "An ophthalmologist is a physician who is

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educated and trained to provide medical and surgical care of the eyes and related structures." Thus the ophthalmologist has already been distinguished in the Code from other health care personnel by virtue of singular education and training. In the rule on delegation, the Academy has now carried forward the distinction by focusing upon "those aspects of eye care within the unique competence of the ophthalmologist."

In addition to eye care functions "within the unique competence of the ophthalmologist," however, an ophthalmologist is often responsible to the patient for the performance of other aspects of eye care. Furthermore, if and while they maintain responsibility for these other aspects, ophthalmologists routinely choose either to perform the other aspects of eye care themselves or to delegate them to other qualified, supervised health care personnel. Included among the other aspects of eye care that may not ordinarily be within the "unique competence of the ophthalmologist" are patient history review, visual acuity testing, refractions, visual field determinations, measurement of eye pressure, nursing care and other functions. "Other aspects of eye care" are, depending upon the circumstances, performed by such health care personnel as nurses, technicians, orthoptists, optometrists, technologists, and others. While some of these can and do perform eye care functions independently, they may be termed "auxiliaries" when, and to the extent that, they are performing delegated functions that remain the responsibility of others such as ophthalmologists. The Academy's rule on delegation now clearly states its meaning—to the extent that, and for as long as, an ophthalmologist is responsible for other aspects of eye care beyond those within the unique competence of the ophthalmologist, those "other aspects" may be delegated to health care personnel who are qualified and adequately supervised.

Neither the American Academy of Ophthalmology nor the Federal Trade Commission is a regulator of the scope of practice of health care personnel. Any determination of what precise eye care functions are "within the unique competence of the ophthalmologist" and what functions are "other aspects of eye care" must depend upon factual inquiry into the circumstances of each situation and legal inquiry into whatever governing mandatory or voluntary credentialing mechanisms or authority might exist. One criterion of eye care functions which is obviously not "within the unique competence of the ophthalmologist" is the existence of laws permitting non-ophthalmologists to perform those functions. This criterion is referenced in a parenthetical in the rule. Similarly, determination of what precise level of supervision is minimally necessary in delegation of functions for which the delegating individual is responsible must also be made by reference to the pertinent facts and any applicable law.

Working determinations on these issues are routinely made by practicing ophthalmologists. And, as with any ethical tenet, non-routine emergency or other such circumstances may justify special responses. The last sentence of the proposed rule on delegation envisions such possibilities and mandates that the patient's welfare and rights always be the foremost considerations.

4. The rule concerning "Postoperative Care," which has been changed from Rule G to Rule H, requires essentially that, where an Academy member performs surgery and cannot attend the patient postoperatively, he or she must arrange in advance for the postoperative care with another ophthalmologist; and fees must reflect the arrangement.

As revised, the rule makes clear that it deals only with the performance of "postoperative eye care within the unique competence of the ophthalmologist." Just as in the previous rule on delegation, this rule requires that those aspects of postoperative eye care be performed by an ophthalmologist, with the stated preference that it be the operating ophthalmologist who performs the services.

The Academy recognizes that there may exist emergency circumstances or those in which, indeed, no ophthalmologist is available in the geographic locale of the patient to perform postoperative eye care on a referral basis. The last sentence of the postoperative care rule is specifically intended to cover emergency or other such situations. It establishes the patient's welfare and rights as the ultimate determinants in questions involving postoperative eye care.

In addition, there are certain instances of minor ophthalmological surgery which do not involve extraordinary risks to patients and for which non-ophthalmologist physicians can and do routinely perform postoperative eye care. They include chalazions, hordeolums, abrasions and superficial lacerations on the eyeball or deeper lacerations on the lid, etc. Also it is not unusual or inappropriate for a preliminary eye care diagnosis of a patient to be performed by a non-ophthalmologist medical doctor such as in larger clinics. The language of Rule H envisions that non-ophthalmologists are not to be precluded from performing such postoperative care since the rule limits itself to aspects of postoperative eye care "within the unique competence of the ophthalmologist" and since it requires that the patient's welfare and rights be placed above all other considerations.

5. Rule M concerns "Communications to the Public." It requires that communications be accurate and it prohibits false or deceptive communications by Academy members. It also describes certain criteria for evaluating whether specific communications are false or deceptive. In discussions with FTC staff, requests have been made for clarification of several of these criteria for the benefit of Academy members.

The rule requires that communications "not omit material information." The Academy intends that the use of the term "material" will be understood to mandate that communications by members include all information which the public would require as essential to avoid being deceived; the term does not mandate that communications must contain all information which the public might prefer to receive. To assure clarification of this mandate, it has been changed to state: *"They must not omit material information without which the communications would be deceptive."*

The rule requires that communications not "appeal primarily to an individual's anxiety . . ." The Academy recognizes that all or most health care topics could raise anxiety for some recipients; and it intends Academy members to regard this criterion as prohibiting only communications which "primarily" raise anxiety, *i.e.,* do so in an excessive or unfair manner. To assure clarification, this criterion has been changed to state: *"Communications must not appeal to an individual's anxiety in an excessive or unfair way . . .".*

The rule has a "full disclosure" provision. It requires: "If communications refer to benefits or other attributes of ophthalmic services or products, realistic assessments of their safety and efficacy must also be included, as well as the availability, benefits or other attributes of any alternatives." FTC staff have asked whether the reference to "ophthalmic services or products" might be mis-understood by Academy members as requiring "full disclosure" even for procedures that do not involve significant risks. The Academy has changed the term to "ophthalmic procedures or products that involve significant risks."

Finally, the question has been raised whether disclosure of "the availability, benefits or other attributes of any alternatives" might sometimes be unnecessary or impracticable once the communication has fully disclosed the safety and efficacy of a procedure or product. The Academy believes that it is minimally necessary, in order to avoid deception, to require disclosure by ophthalmic surgeons who are Academy members at least of the fact of the existence of alternatives when qualitatively describing to the public ophthalmic procedures or products that involve significant risks and that have alternatives, and to require identification or even description of the alternatives in circumstances in which that information is essential to avoid deception to the public. This criterion in Rule M has been changed accordingly.

Enclosed with this supplement to the Academy's request for an advisory opinion is a copy of the Rules of Ethics from the proposed Code* which rules have been revised to reflect all changes described in the supplement.

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All clarifications and explanations contained in this supplement regarding issues in the Academy's proposed Code of Ethics will be included fully and reflected precisely in any Academy advisory opinion, informal interpretation or enforcement of its Code that involves those issues.

The Academy reiterates the importance of receiving an expedited response to its advisory opinion request to the Federal Trade Commission.

Very truly yours,

Leighton Conklin Lemov Jacobs
and Buckley

/s/ Jerald A. Jacobs

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